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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1350

UNITED ORDER OF AMERICAN BRICKLAYERS AND STONE MASONS, LOCAL 21, *Petitioner*

v.

WILLIAM A. WATERS AND DONALD SAMUELS, AND WISCONSIN STEEL WORKS OF INTERNATIONAL HARVESTER COMPANY, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner United Order of American Bricklayers and Stone Masons, Local 21, a defendant in this action, prays that if certiorari is granted in the petition heretofore filed by plaintiffs, No. 74-1064, *Waters, et al.* v. *Wisconsin Steel Works, et al.*, to review a part of the judgment entered by the United States Court of Appeals for the Seventh Circuit in the above-entitled case on August 26, 1974, then certiorari should also be granted to review that portion of that judgment which is adverse to the present petitioner.

OPINIONS BELOW

The original opinion of the District Court was reported at 301 F.Supp. 663 and is reproduced at pp. 58a-63a of the separately bound appendix to this petition ("App."). The opinion of the Court of Appeals on the first appeal to it is reported at 427 F.2d 476 and is reproduced at App. 30a-56a. The opinion of the District Court after trial on remand is not officially reported and is reproduced at App. 23a-29a. The opinion of the Court of Appeals rendering the judgment of which review is sought herein is reported at 502 F.2d 1309 and is reproduced at App. 1a-20a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 26, 1974. A petition for rehearing was denied on November 26, 1974 (App. 21a). On February 13, 1975 and March 27, 1975, respectively, Mr. Justice Rehnquist entered orders extending the time within which to file the petition for a writ of certiorari until April 10 and further until April 25, 1975. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does 42 U.S.C. § 1981 forbid racial discrimination in private employment; if so, does it prohibit discriminatory practices other than the refusal to hire on the basis of race?

2. Does 42 U.S.C. § 1981 require the recall of a black worker who had not been discriminated against in hire over white workers who have a greater period of service for the employer, where none of the affected employees have a contractual right to be recalled?

3. May a union be found jointly liable with an employer for a violation of 42 U.S.C. § 1981 because the union was a party to a provision of a collective bargaining agreement which was racially neutral on its face, but was found illegal because the employer had previously engaged in racial discrimination in hire, where the union did not participate in the hiring?

4. If 42 U.S.C. § 1981 forbids racial discrimination in private employment, is the appropriate statute of limitations in a suit for back pay the residual statute of limitations of the State in which the alleged violation occurred?

STATUTES INVOLVED

1. 42 U.S.C. § 1981 provides that:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

2. The major provisions of Title VII of the Civil Rights Act of 1964 (78 Stat. 241, 253-66, 42 U.S.C. §§ 1971, 2000e-2000e-15) are set forth at App. 64a-85a.

3. The pertinent provisions of the Labor-Management Relations Act of 1947 (61 Stat. 136, 29 U.S.C. § 151 *et seq.*) provide:

> Sec. 8(b): "It shall be an unfair labor practice for a labor organization or its agents * * * (3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a)".

Sec. 8(d): "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, * * * "

Sec. 9(a): "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * * "

STATEMENT OF THE CASE

A. The Proceedings Below.

1. The complaint and its original dismissal by the District Court.

In December 1968, the complaint herein was filed in the United States District Court for the Northern District of Illinois by William A. Waters and Donald Samuels (hereafter "plaintiffs") against Wisconsin Steel Works of the International Harvester Company (hereafter "the Company") and the United Order of American Bricklayers and Stone Masons, Local 21 (hereafter "the Union"). The complaint asserted claims under § 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981; Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e to e-15; § 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a); and the National Labor Relations Act, 29 U.S.C. §§ 151 to 167. The gravamen of the complaint was that the Company had engaged in racial discrimination with respect to

"its hiring of Negro bricklayers and its admission of Negroes into its bricklayers apprenticeship program"[1] so that the Company's seniority, layoff and recall policies and its collective bargaining agreement with the Union on these subjects were illegal (J.A. 4-6). It was alleged that Waters was employed by the Company between June and September 1964 (J.A. 2), but not that Waters had applied for a job before 1964, much less that he had been discriminatorily denied employment.

The Company and the Union moved to dismiss the complaint. The District Court granted their motions on the ground that the complaint failed to state a cause of action (App. 58a-63a).

2. The first decision of the Court of Appeals.

On appeal, the Court of Appeals for the Seventh Circuit reversed the complaint. Breaking new ground, the Seventh Circuit held that 42 U.S.C. § 1981 prohibits racial discrimination in private employment (App. 35a-40a). This conclusion was based on a reading of this Court's decision in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, interpreting 42 U.S.C. § 1982, "particularly * * * the Supreme Court's analysis of *Hodges* v. *United States*, 203 U.S. 1" (App. 37a-38a), and the Seventh Circuit's view of the legislative history (App. 38a-39a).

In its first opinion the Court decided one other proposition which remains pertinent: The time-bar applicable to an action based on 42 U.S.C. § 1981 "is con-

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[1] The Joint Appendix in the Court of Appeals shall be referred to herein as "J.A." The transcript of the trial shall be referred to as "Tr." followed by page citation. Both have been lodged with the Clerk of this Court.

trolled by the statute of limitations which governs the most analogous state action", and in Illinois that statute is the five-year limitations period "governing civil actions not otherwise provided for" (App. 49a-50a).

The Union and the Company petitioned for certiorari, but certiorari was denied, 400 U.S. 911.

3. The proceedings on remand in the District Court.

On remand, the parties entered into numerous factual stipulations which were embodied in a final pretrial conference order (J.A. 22-41). That order also stated the position of the parties with respect to the issues presented for decision. In their statement of issues the plaintiffs abandoned their claim of a breach of the duty of fair representation on the part of the union.[2] Thereafter, the case was tried without a jury before Judge William J. Campbell. On May 2, 1973, Judge Campbell issued his decision. He concluded that prior to April 1964 Wisconsin Steel had discriminated against blacks in the hiring of bricklayers and

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[2] The issues stated by plaintiffs were:

"1. Whether Title VII vests this Court with jurisdiction over defendant LOCAL 21 and whether Section 1981 vests this Court with jurisdiction over defendant WISCONSIN STEEL WORKS;

2. Whether defendant WISCONSIN STEEL WORKS discriminated against black bricklayers prior to April, 1964;

3. Whether defendants' adherence in decisions for employment, retention, dismissal or rehiring to a seniority system that has its genesis in a period of racial discrimination is in violation of Title VII and Section 1981;

4. Whether defendants' revision of the Severance Pay Agreement with its effect of permitting defendant WISCONSIN STEEL WORKS to re-employ their white bricklayers ahead of plaintiffs WATERS and SAMUELS is in violation of Title VII and Section 1981." (J.A. 34)

that the seniority system negotiated between the defendants "had its genesis in a period of racial discrimination". (App. 27a) He concluded further that the defendants had illegally discriminated against Waters by laying him off in September 1964, failing to recall him in March 1965 and laying him off in May 1967. He also determined that the June 5, 1966 agreement to amend the earlier severance pay agreement was illegal and discriminated against the rights of both Waters and Samuels (App. 27a-28a).

He directed that Wisconsin Steel offer the plaintiffs employment, and awarded each of them $5,000 back pay from the defendants jointly and severally.[3] He also awarded plaintiffs $5,000 attorneys fees to be paid by the defendants (App. 28a-29a). Plaintiffs filed a notice of appeal on July 27, 1973 (J.A. 104). Thereafter, the defendants filed cross-appeals (J.A. 105-106).

4. The second decision in the Court of Appeals.

On August 26, 1974, the Court of Appeals affirmed the judgment of liability in part as to plaintiff Waters, and reversed it in its entirety as to plaintiff Samuels. The case was remanded for further consideration on the question of damages and attorneys fees to Waters in light of the Court's opinion. (App. 20a).

For the purposes of the present petition the following holdings are pertinent:

a. The conclusion of the District Court that Wisconsin Steel had discriminated against black appli-

[3] The back pay award was made in the "exercise of the Court's discretion" under § 706(g) of Title VII (42 U.S.C. § 2000e-5(g) because of "the absence of a racially discriminatory motive on the part of the two defendants" (App. 29a).

cants for hire before 1964 was sustained (App. 9a-10a).

b. The Court held that the Company's seniority system does not perpetuate the effects of past discrimination and violates neither Title VII nor 42 U.S.C. § 1981 (App. 10a-16a).

c. "In light of Wisconsin Steel's past history of racially discriminatory hiring practices and the racially neutral yet potentially discriminatory impact of the employment seniority system utilized by the company, we hold that the June 1966 agreement reinstating contract recall rights to three white bricklayers was racially discriminatory with respect to Waters." (App. 16a).

d. The Union "shares jointly" in the Company's liability because the Union "was an integral party to the June 1966 amendment which discriminated against Waters. *Johnson* v. *Goodyear Tire & Rubber Co.*, 7 EPD, ¶ 9233 [491 F.2d 1364] (5th Cir. 1974)" (App. 17a-18a).

B. The Undisputed Facts Relevant to This Petition.

1. The facts on which the Court of Appeals based its conclusion that Plaintiff Waters had been discriminated against.

We first quote in its entirety the Court of Appeals' statement of the facts which bear on its conclusion that plaintiff Waters was discriminated against in violation of 42 U.S.C. § 1981 when former employees with longer service with the Company were reinstated in preference to him on January 17, 1967 (see App. 16a-17a, 18a):

> "With respect to the seniority system as it relates to Waters, it was established at trial that the collective bargaining agreements between Wiscon-

sin Steel and Local 21 have since 1946 provided for a "last hired, first fired" seniority system for bricklayers employed at Wisconsin Steel. The seniority system gives full credit to all bricklayers for their actual length of service or earned seniority as bricklayers. Seniority vests after a 90-day probationary period and may be broken by various events, including lay-offs in excess of two years. The system governs the order of lay-offs and recalls of bricklayers.

Waters first inquired about employment at Wisconsin Steel in the fall of 1957. He was told that no bricklayers were being hired. Approximately seven years later Waters inquired a second time for employment and was hired in July 1964. Two months later, in September 1964, Waters was laid off according to his length of service and before completing his 90-day probationary period and achieving contractual seniority status. Waters' lay-off was one of several lay-offs during late 1964 and 1965 which occurred as a result of an anticipated decrease in the steel plant's bricklaying needs because of a fundamental change in the steelmaking process. (During this period, Wisconsin Steel was converting from twelve open-hearth brick-lined furnaces to two basic oxygen furnaces, and, consequently, it had been anticipated that the volume of brick maintenance work would be correspondingly reduced.) By March 1965, over thirty bricklayers with up to ten years seniority had been laid off. Wisconsin Steel had expected that over half of the laid-off bricklayers, including eight bricklayers with five to six years seniority, would not be recalled within the two-year period and that pursuant to the terms of the collective bargaining contract these bricklayers' centractual seniority rights would be lost.

During the course of the next year, however, Wisconsin Steel became aware that it had under-

estimated its bricklayer requirements for the basic oxygen steelmaking process. The company therefore began recalling bricklayers in the order of their length of prior service.

Besides the contractual right of recall for those employees with contractual rights, Wisconsin Steel had a policy that former employees, including bricklayers who did not have contractual seniority rights would nonetheless be recalled according to their length of service. In March 1967, pursuant to this policy and not because of contractual right of recall, Waters was recalled. Waters accepted reinstatement and continued to work until May 19, 1967 when he was once again laid off because of a temporary reduction in plant operations. Waters was recalled on August 30, 1967, but refused this third offer of employment because he had another job and also, because he believed that his return to Wisconsin Steel might prejudice his then pending EEOC charges against Wisconsin Steel which he had filed in May 1966.

With respect to the amendatory agreements to the collective bargaining contract which plaintiffs challenge as discriminatory, the following evidence was adduced at trial. Prior to 1965, Wisconsin Steel, unlike other steel plants, had no provision for severance pay in its collective bargaining agreement with Local 21. However, in March 1965, after the decision had been made to lay off eight white bricklayers having five to six years seniority, the company negotiated a "severance agreement" with Local 21, dealing exclusively with these eight employees. The agreement provided that after being laid off the eight bricklayers could elect to retain their contractual seniority rights or receive $966.00 in severance pay. An election to retain contractual seniority rights carried with it the risk that these bricklayers would lose their seniority rights anyway after two

years on lay-off; this risk was believed to be substantial in view of Wisconsin Steel's anticipated decline in bricklaying needs. Consequently, the eight bricklayers, subsequent to their involuntary lay-off pursuant to seniority, elected to receive severance pay, thereby forfeiting their contractual seniority rights to recall.

As noted earlier, it became apparent to Wisconsin Steel in 1966 that it had underestimated its predicted bricklaying requirement for the basic oxygen process. In view of its new felt demand for bricklayers and its asserted belief that an injustice had been done to the eight bricklayers who had exchanged their contractual seniority rights for $966.00, the company proposed to Local 21 that the March 1965 severance pay agreement be partially nullified by an amendment restoring the eight bricklayers' contractual seniority rights for purposes of recall. Accordingly, an amendatory agreement was entered into in June 1966. Three of the eight white bricklayers who had previously accepted the severance pay also accepted the recall and returned to work, two in July 1966 and the third in January 1967. In each instance the man was rehired without reapplying with the company for employment." (App. 3a-5a)

2. The undisputed facts relating to the Union's liability.

The Court of Appeals based its conclusion that the Union was jointly liable with the Company for the violation of Waters' rights solely on the fact that the Union was an integral party to the June 1966 amendment to the severance pay agreement. See pp. 8-9, *supra*. The Court stated that it was "the company [which] proposed to Local 21 that the March 1965 severance pay agreement be partially nullified by an amendment restoring the eight bricklayers' contractual seniority

rights for purposes of recall" (App. 5a). The Court also observed, in discussing the violation, that there was a Company policy "pursuant to which plaintiff Waters was himself recalled, [which] provided that former employees without contractual rights of recall would nonetheless be recalled in order of their length of prior service" (App. 16a). That policy was found to be "no defense to the defendants' action in entering the June 1966 agreement" (App. 17a). The Court also found that it was Wisconsin Steel which "engaged in racially discriminatory policies" with respect to bricklayers prior to 1964 (App. 9a-10a, 17a). No such finding was made with respect to the Union. While it is our position that even if only these facts are considered, the Court erred as a matter of law in holding the Union liable, the record contains other undisputed facts which further support the Union's position that it was not legally responsible for the failure to recall Waters. We therefore set forth these facts, which appear either in the stipulation of the parties, in joint exhibits or in uncontradicted testimony:[4]

The Union represents bricklayers employed in Cook County, Illinois (J.A. 23). At the Company's plant the Union represents the bricklayers in a unit composed of "all bricklayers, bricklayer apprentices, and bricklayer leaders . . . " (jt. ex. 1, 2, § 3; Tr. 129), and the terms of their employment have been governed by collective bargaining agreements between the Company and the Union at least since 1944 (J.A. 24). Beginning no later than August 15, 1962, the agreements prohibit

[4] The stipulation became part of the pretrial order and is reproduced at pp. 23-31 of the Joint Appendix. The stipulated facts were expressly incorporated by reference into and made a part of, the District Court's findings (App. 24a).

inter alia racial discrimination in employment in the following terms (J.A. 27; jt. ex. 1, 2, § 2):

> "Neither the Company nor the Union, in carrying out their obligations under this Contract, shall discriminate in any manner whatsoever against any employe because of race . . . .
>
> The Company agrees to continue its present nondiscriminatory policy offering equal opportunities for available jobs to qualified applicants without regard for their * * * race * * *".

The Company exercises exclusive control over initial hire within the bricklayer work force (Tr. 145, J.A. 27). The Company operates its own bricklayer apprenticeship program in which the Union does not participate and over which it has no control (J.A. 29). Thus, the Union was not involved in any way, *and had no knowledge of the applications* for employment filed by the plaintiffs at any time with any employer, including the defendant Wisconsin Steel Works (J.A. 27). Since 1962 or 1963 an individual interested in employment with the Company as a bricklayer comes to its employment office and makes out an employment application for the job. Mail applications are also accepted. The application form does not call for or record the applicant's race either openly or secretly. The applications are filed in chronological order and are retained for one year. When the general foreman needs additional bricklayers he informs the employment office of the number he requires, and the employment office turns over to him "that number of applications, beginning with the oldest one on hand and counting off the required number." The Union has no arrangement with the Company for referral of brick-

layers to it for employment; the Company does not look to the Union as a source of workers (Tr. 144-145).

At no time has the Union refused to admit any individual to membership because of his race (J.A. 28). Blacks have participated in the prosecution of grievances through arbitration (J.A. 28; Tr. 80-89). The benefits of the collective bargaining agreement have been evenhandedly available to all employees regardless of race (J.A. 31). Neither Waters nor his co-plaintiff Samuels ever brought to, filed with, or made known to agents or officials of the Union any complaint against the Company (J.A. 27).

REASONS FOR GRANTING THE WRIT HEREIN IF A WRIT IS GRANTED IN NO. 74-1064

"There is a time for all things under the sun", not least "a time to make peace". In our view, the latest decision of the court below herein marked that time even though we strongly disagree with much of that decision and even though it adversely affects our interests. But, as evidenced by their petition in No. 74-1064, the plaintiffs are so anxious to pursue this litigation that, at least as we view it, they have rewritten the record and misstated what the Court of Appeals has held, in order to make of this case something that it is not. See our Memorandum in Opposition in No. 74-1064. Yet, if, notwithstanding our showing in that memorandum, the Court were to decide to adjudicate this controversy, it should have before it the entire case, so that it can do full justice to all the parties. For this reason, and out of an abundance of caution in face of the uncertainties generated by *NLRB* v. *International Van Lines,* 409 U.S. 48, 52, n. 4, we file this cross-petition for certiorari. And since we seek certiorari only in the event that the Court deter-

mines to review the judgment below at the plaintiffs' behest, our discussion of the merits will be confined to the bare minimum deemed necessary to describe our position to the Court.

1. The non-relevance of 42 U.S.C. § 1981 to this case.

The court below predicated the Union's liability here exclusively on 42 U.S.C. § 1981. The case, therefore, necessarily involves the questions whether § 1981 prohibits racial discrimination in private employment and if so, the scope of that prohibition. On the original appeal, the Seventh Circuit held that § 1981 "is intended to prohibit private racial discrimination in employment by companies and unions" (App. 36a). Review of that determination by this Court is singularly appropriate because the decision of the court below, and of the other courts that have adopted its construction of § 1981 [5] derives from a reading of this Court's holding in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, and its progeny,[6] that 42 U.S.C. § 1982 prohibits "*all* racial discrimination, private as well as public, in the sale or rental of property. . . ." (392 U.S. at 413, quoted at App. 36a, Court of Appeals' emphasis).

The Seventh Circuit reasoned that § 1981 and § 1982, which have a common origin in Section 1 of the 1866

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[5] *Sanders* v. *Dobbs Houses, Inc.*, 431 F.2d 1097 (C.A. 5 cert. denied, 401 U.S. 948; *Young* v. *International Telephone & Telegraph Co.*, 438 F.2d 747 (C.A. 3); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (C.A. 4); *Brady* v. *Bristol Meyers Co.*, 459 F.2d 621 (C.A. 8); *Macklin* v. *Spector Freight Systems*, 478 F.2d 979 (C.A.D.C.); *Long* v. *Ford Motor Co.*, 496 F.2d 500 (C.A. 6).

[6] *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229; *Tillman* v. *Wheaton-Haven Recreational Assn.*, 410 U.S. 431.

Civil Rights Act, are analogous, and pointed to a footnote in *Jones* where this Court said: "the right to contract for employment [is] a right secured by 42 U.S.C. § 1981 (. . . derived from § 1 of the Civil Rights Act of 1866. . . .)" (392 U.S. at 442, n. 78, as quoted at App. 36a-37a).

We do not dispute that §§ 1982 and 1981 are to be read together. As we said in our petition for certiorari after the original appeal (hereafter "1970 Pet."):

> "We may assume that the force of the reasoning of *Jones* v. *Mayer* requires the conclusion that section 1981, no less than section 1982, prohibits all interference with the rights it confers whether the source of that interference is private or governmental action." (1970 Pet., p. 17)

What we do assert, as we did there, is that

> "*Jones* v. *Mayer* does not define, contrary to the uncritical supposition into which the Court of Appeals slides, the scope of the right conferred by section 1981. In other words, while we may assume that section 1981 bars both private and governmental interference, it is still necessary to ascertain just what it is that section 1981 safeguards from interference." (*Id.*)

We believe that what § 1981 safeguards is the *legal capacity* to enter contractual relationships and to realize the fruits of the compact. Section 1981 invests in every person the same legal capacity "to make and enforce contracts" that a white person has.[7]

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[7] Indeed the Court of Appeals' interpretation renders almost wholly redundant § 1982 as interpreted in *Jones*, since to "purchase, lease, sell, hold, and convey property" are but specific incidents of contracting; except possibly for the "right to inherit," the prohibitions of § 1982 would therefore be unequivocally embraced within a prohibition of a racial refusal "to make and enforce contracts".

Even if § 1981 prohibits racial discrimination in private employment, it by no means follows, as the Court of Appeals also assumed, that that provision authorizes the courts to develop a general code of fair employment practices.[8] The right "to make and enforce contracts" is not a right to make and enforce them on any particular terms. The most that can be drawn by analogy from *Jones* (where the illegal act was the failure to enter into a real estate transaction) and the language of § 1981 is that this provision protects the right, to make employment contracts, that is, to be hired, without being subject to racial discrimination.

We note lastly that the consequences of this interpretation of 42 U.S.C. § 1981 are not restricted to the subject of employment. The right "to make and enforce contracts"—whatever it may be—embraces not only employment contracts but every service, product, or relationship for which a person can contract. If the courts of appeals have correctly understood the implication of *Jones,* then every private decision not to contract with a black because of his race is actionable under §1981. Only the other day the Fourth Circuit held it to be unlawful for a private school to deny admission to black children. *McCrary* v. *Runyon,* (C.A. 4, Nos. 73-2350 *et seq.,* April 15, 1975.) Having drawn from *Jones* the rule that the right to contract without being subject to racial discrimination is assured by § 1981, Chief Judge Haynsworth held:

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[8] Of course, if the courts are empowered by § 1981 to formulate a fair employment practices code, we maintain that they must follow the more recent Congressional determination on this subject, embodied in the Civil Rights Act of 1964. *Cf. Boys Markets* v. *Retail Clerks,* 398 U.S. 235. See 1970 Pet. pp. 25-30.

> "The section is violated by the school as long as the basis of exclusion is racial, for it is then clear that the black applicant is denied a contractual right which would have been granted to him if he had been white." (Id. slip op. p. 10)

The proposition that admission to a private school is a contractual relationship is unassailable, and the holding in *McCrary* is inevitable, if the interpretation of 42 U.S.C. § 1981 which the court below adopted in this case may stand. Surprising as the result in *McCrary* may be, given the strenuous efforts deemed necessary by able counsel in cases such as *Griffin* v. *Prince Edward School Board*, 377 U.S. 218, *Norwood* v. *Harrison*, 413 U.S. 455, and the Girard College litigation, it is not more so than the first decision of the Court of Appeals herein was to those of us who believed that a historic breakthrough for the elimination of racial discrimination in private employment had been accomplished by the enactment of Title VII of the Civil Rights Act of 1964.

2. The effect of 42 U.S.C. § 1981 on this case.

If, contrary to our view, 42 U.S.C. § 1981 forbids racial discrimination in private employment, and extends beyond refusals to hire, the decision below is wrong because, in the name of enforcing § 1981, it mandated discrimination in reverse. The Court of Appeals held in this case that plaintiff Waters' rights under § 1981 had been violated because he was black and preference in re-employment had been given former employees who were white, and who had longer employment service with the Company but had broken their seniority by accepting severance pay. There is, of course, nothing in 42 U.S.C. § 1981 which forbids employers from using length of service as a basis for

choosing among applicants for employment or re-employment. Nor is there anything in that statute which requires an employer to exact a waiver of contractural rights based on service from employees to whom he has given severance pay, or which forbids the employer from thereafter taking their length of service into account despite their waiver. Rather, the Court of Appeals' theory was because Wisconsin Steel had discriminated against blacks in hiring prior to 1964,

> "[a] company policy of according priority to white bricklayers who had accepted the benefits of severance pay would, in our view, project the company into the realm of presently perpetuating the racial discrimination of the past. The company policy is no defense to the defendants' action in entering the June 1966 agreement restoring contractual seniority to three white bricklayers." (App. 17a.)

The result was that the Court interpreted 42 U.S.C. § 1981 to require that Waters (who was not found to have been denied a job and thereby deprived of the opportunity to accumulate seniority) to a preference over white employees, although he had a shorter period of service with the Company, and although he had no contractual right to recall.

The foregoing holding is contrary to the very requirement of equality which 42 U.S.C. § 1981 establishes, if it reaches this subject at all:

As the Court of Appeals for the Sixth Circuit said in *Long* v. *Ford Motor Co.*, 496 F.2d 500, 505 (footnote omitted):

> "Section 1981 is by its very terms, however, not an affirmative action program. It is an equalizing

> provision, seeking to ensure that rights do not vary according to race. It does not require that persons be accorded preferential treatment because of their race. On this point we view the Supreme Court's discussion of Title VII as applicable to Section 1981.

The decision of the Seventh Circuit in Waters' favor canot be reconciled with this interpretation of § 1981.

3. The basis of union liability.

We set forth in its entirety that portion of the Court of Appeals' opinion which sustains the Union's liability:

> "Local 21 contends that there is insufficient evidence to support a claim against the union under section 1981. It is enough, however, that the union was an integral party to the June 1966 amendment which discriminated against Waters. *Johnson* v. *Goodyear Tire & Rubber Co.*, 7 EPD, ¶ 9233 [491 F.2d 1364] (5th Cir. 1974). Local 21 therefore shares jointly in the liability of Wisconsin Steel." (App. 17a-18a)

The matter is not nearly so simple. Indeed, the Fifth Circuit's decision in *Goodyear* did not hold that it is sufficient to union liability to show that it was party to an illegal collective bargaining agreement. Rather, the Court found that the "union was more than a passive participant in the contractual arrangements which furnished a substantial contribution to the discriminatory results evident here" (491 F.2d at 1381-1382). And even on those facts the Court held not, as did the Seventh Circuit herein, that the employer and the union were jointly liable, but apportioned the back pay award among the defendants (*id.* at 1382). On the Seventh Circuit's approach herein, by contrast,

all discussion of the nature and consequences of the Union's conduct is pretermitted.[9]

For purposes of this petition we may assume that § 1981 does reach the conduct of unions, acting as col-

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[9] The Court of Appeals' view of union liability is the product of basic misunderstanding of the relationship between the unions and the employees whom it represents. On the first appeal, the Court said:

> "Racial discrimination in employment by unions as well as by employers is barred by section 1981. The relationship between an employee and a union is essentially one of contract. Accordingly, in the performance of its functions as agent for the employees a union cannot discriminate against some of its members on the basis of race. (App. 39a)

It is well established, however, that this relationship derives not from contract, but from statute, namely § 9(a) of the Labor-Management Relations Act of 1947. See p. 4, *supra*. And it is because of "the very nature of the exclusive bargaining representative's status as representative of *all* unit employees" that this Court has held that "Congress implicitly imposed upon it a duty fairly and in good faith to represent the interests of minorities within the unit" (*Emporium Capwell Co.* v. *Western Addition Commun. Org.*, 95 S.Ct. 977, 986). It is the duty of fair representation which is both the source and measure of the union's responsibility when it acts as bargaining representative. But it is the employer, not the union, who makes contracts with employees, and who therefore alone has power (even though its exercise may be illegal) to engage in racial discrimination in making employment contracts. Cf. *J. I. Case Co.* v. *Labor Board*, 321 U.S. 332, 334-35, *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 583.

In a collective bargaining relationship the union contracts as representative of the employees (which brings into play the duty of fair representation); it does not contract with the employees. However, the union-member relationship is contractual in nature, *Machinists* v. *Gonzales*, 356 U.S. 617, 618. Thus, if § 1981 requires that the decision to contract or not to contract be made on a racially non-discriminatory basis, that provision prohibits a union from denying membership to individuals on the basis of their race.

lective bargaining representatives, which abets and aggravates racial discrimination against the employees. For, whereever the line establishing union liability may ultimately be drawn, the present case is at the farthest non-liability point on the continuum. We shall not repeat pertinent facts set forth at pp. 11-14, *supra;* we only point out the most significant. First, the 1966 agreement, which is the basis of the Union's liability, cannot be viewed in isolation. It merely restored the seniority relationship between the employees which existed before the severance pay agreement was entered into. Indeed, even if the 1966 agreement is viewed in isolation, the Union's participation therein did not adversely affect Waters, since absent the agreement the Company policy to prefer employees with longer service would have come into play. Second, the agreement was non-discriminatory on its face and was determined to give rise to liability in favor of Waters only because the Company had previously discriminated in hiring, over which it had complete control. Lastly, there is no showing that the Union was even on notice that entering into the 1966 agreement would have a racially discriminatory effect. In short, the Union can be found guilty only if the Civil Rights Act of 1866 is construed to impose liability without fault.[10]

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[10] To hold the union liable where it has done no more than to execute a collective bargaining agreement which is non-discriminatory on its face, would have serious adverse consequences for the enforcement of rights under the anti-discrimination laws. Employers whom the union charges with discrimination would not only threaten cross-claims against the union but would also move to disqualify the union as the employees' representative in the litigation because it would be jointly liable for any recovery. These tactics have already been employed by the defendant in *Lynch* v.

4. The applicable statute of limitations.

If 42 U.S.C. § 1981 permits an action for damages to remedy racial discrimination in private employment, the question necessarily arises as to what statute of limitations governs such an action. That question, of course, is a frequently recurring one, since it determines not only whether a plaintiff's claim is time-barred in its entirety but also the period for which damages may be recovered. This issue has generated a wide variety of views among the courts of appeals. And the particular solution reached by the Seventh Circuit in this case, that such suits are governed by the state statute which prescribes limitations for "civil actions not otherwise provided for" (App. 49a-50a) has been squarely rejected by the Fifth Circuit. Even a brief survey of the appellate decisions will reveal the current confusion and inconsistency on this question.

The Fifth Circuit has expressly disapproved both the theory that the applicable state statute of limitations is that governing claims not otherwise provided for, and also the theory that the applicable statute is that governing contract actions.[11] The Sixth Circuit

Sperry Rand Corp., 62 F.R.D. 78, 83-85 (S.D.N.Y.), where the Court did disqualify a union which had brought a major sex discrimination case; we are informed that *Sperry* is also serving as a blueprint for other employers faced with union actions to enforce the anti-discrimination laws. This does not mean, of course, that a union should gain immunity by threatening or bringing an anti-discrimination case. If the union, in violation of its duty of fair representation, has exacerbated the situation, a recovery against it may be had.

[11] *Guerra* v. *Manchester Terminal Corp.*, 498 F.2d 641, 647-648 (C.A. 5). Following *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1378-1379 (C.A. 5), the Court held the applicable statute to be that which governs recovery of back pay. Accord: *Franks* v. *Bowman Transportation Co.*, 495 F.2d 398, 405 (C.A. 5), cert. denied on other issues, 43 U.S.L.Wk. 3330, cert. granted on other issues, 43 U.S.L.Wk. 3515.

has also rejected the contract limitations period, in part because "the complaint [under § 1981] sounds in tort rather than in contract"; instead, that Court adopted a state statute which dealt with "civil actions for compensatory or punitive damages, or both, brought under the civil rights statute".[12] In contrast, the Seventh Circuit has herein held the residual statute to be applicable in preference to any specific statute, including the state Fair Employment Practices statute as we had urged. But the Eighth Circuit has accepted, with apparent approval, the position of both parties to the case that the statute governing suits on contracts is applicable.[13] The Ninth Circuit has taken the view that the applicable period of limitations is either that governing suits on contracts *or* the catch-all provision governing actions arising under statute other than for a penalty.[14] The District of Columbia Circuit has taken the similar but not identical position that the governing statute is either the catch-all provision or the contract statute,[15] thereby opting for precisely those alternatives which the Fifth Circuit has rejected.

The upshot is that the court below has held the residual statute to be applicable and the Ninth and D. C. Circuits have held that the residual statute may be applicable. However, the Fifth Circuit, has expressly rejected use of the residual statute, and the Sixth Cir-

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[12] *Johnson* v. *Railway Express Corp.*, 489 F.2d 525, 529 (C.A. 6), cert. granted on another issue, but denied on this issue, 417 U.S. 929.

[13] *Green* v. *McDonnell Douglas Corp.*, 463 F.2d 337, 340 (C.A. 8), vacated and remanded on other issues, 411 U.S. 792.

[14] *Griffin* v. *Pacific Maritime Association*, 478 F.2d 1118, 1119 (C.A. 9).

[15] *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 993-994 (C.A.D.C.).

cuit has done so implicitly by adopting a specific statute. The view that suits for contracts provide the closest analogy, which the Eighth, Ninth and D. C. Circuits have approved at least arguendo, is not accepted by the Fifth and Sixth Circuits. And, as to whether a state limitations statute governing civil rights applies, the Sixth Circuit has answered in the affirmative and the Seventh Circuit has answered in the negative. Only this Court can bring order out of this chaos, and in so doing resolve the direct conflict between the views of the court below in this case and the decisions of the Fifth and Sixth Circuits.[16]

CONCLUSION

For the foregoing reasons this petition for certiorari should be granted if certiorari is granted in No. 74-1064, which arises out of the same judgment.

Respectfully submitted,

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[16] To be sure, unless this Court chooses to adopt a single national limitations period for employment discrimination cases under 42 U.S.C. § 1981, (as we have urged as an alternative to the state anti-discrimination limitation) total uniformity cannot be reached. But there should at least be agreement as to method; that is, as to the characterization of the state statute whose limitation is to be borrowed as a matter of federal law.

Supreme Court, U. S.
FILED
APR 25 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1350

UNITED ORDER OF AMERICAN BRICKLAYERS AND STONE MASONS, LOCAL 21,
Petitioner

v.

WILLIAM A. WATERS AND DONALD SAMUELS, AND WISCONSIN STEEL WORKS OF INTERNATIONAL HARVESTER COMPANY,
Respondents

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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APPENDIX A

Decision of Court of Appeals (August 26, 1974)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Nos. 73-1822, 73-1823, and 73-1824

WILLIAM A. WATERS and DONALD SAMUELS,

Plaintiffs-Appellants,

v.

WISCONSIN STEEL WORKS OF INTERNATIONAL HARVESTER COMPANY, a corporation, and UNITED ORDER OF AMERICAN BRICKLAYERS AND STONE MASONS, LOCAL 21, an unincorporated association,

Defendants-Appellees.

UNITED ORDER OF AMERICAN BRICKLAYERS AND STONE MASONS, LOCAL 21,

Defendant-Appellant,

v.

WILLIAM A. WATERS and DONALD SAMUELS,

Plaintiffs-Appellees.

INTERNATIONAL HARVESTER COMPANY,

Defendant-Appellant,

v.

WILLIAM A. WATERS and DONALD SAMUELS,

Plaintiffs-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 68 C 2483

WILLIAM J. CAMPBELL, *Judge.*

ARGUED APRIL 22, 1974 — DECIDED AUGUST 26, 1974

Before SWYGERT, *Chief Judge,* HASTINGS, *Senior Circuit Judge,* and SPRECHER, *Circuit Judge.*

73-1822, 73-1823, 73-1824

SWYGERT, *Chief Judge.* Plaintiffs William A. Waters and Donald Samuels, both black journeymen bricklayers, appeal from a judgment of the district court entered after a bench trial finding that the defendants had violated both Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and Section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981. The plaintiffs' appeals center solely on the district court's approach to calculating the plaintiffs' back-pay award and attorneys' fees under Title VII. Defendants International Harvester Company (International), Wisconsin Steel Works of International Harvester Company (Wisconsin Steel), and Local 21, United Order of American Bricklayers and Stone Masons (Local 21), cross-appeal from the district court's finding that they violated § 1981 and Title VII.

International operates a large steel plant in Chicago, known as the Wisconsin Steel Works. It employs a small force of bricklayers to maintain and repair blast furnaces. Local 21 is the exclusive bargaining representative for the bricklayers employed by International.

Waters and Samuels initiated an action in the district court on December 27, 1968, claiming that certain employment practices and policies of International and joined in by Local 21 deprived them of rights secured by: Section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*; the Labor Management Relations Act, 29 U.S.C. § 185(a); and the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* Before filing their suit, plaintiffs in May, 1966 had registered complaints with both the Illinois Fair Employment Practices Commission and the United States Equal Employment Opportunity Commission (EEOC) charging Wisconsin Steel with racial discrimination due to Wisconsin Steel's lay-off of Waters and its subsequent refusal to rehire him and its failure to hire Samuels. The State Commission dismissed the charges as unsubstantiated; likewise the EEOC concluded in a February, 1967 decision that no probable cause existed to believe that Wisconsin Steel had violated Title VII. But as a result of new evidence that white bricklayers had been hired after Waters sought reinstatement and Samuels had requested initial employ-

ment, the EEOC reassumed jurisdiction and, on reconsideration, it determined that the plaintiffs had cause to sue.

Shortly thereafter the plaintiffs initiated their action as a class action against both International and Local 21. On defendants' motions, the district court dismissed plaintiffs' claims. On appeal we reversed and remanded the cause for a trial. *Waters* v. *Wisconsin Steel Works*, 427 F.2d 476 (7th Cir. 1970), *cert. denied*, 400 U.S. 911 (1970). On remand the plaintiffs abandoned their class allegations and proceeded to trial on claims of individual discrimination against the two plaintiffs.

At trial Waters challenged the existence of Wisconsin Steel's "last hired, first fired" seniority system for bricklayers. Waters claimed the system violated section 1981 and Title VII in that it perpetuated alleged prior discriminatory policies and hiring practices of the defendants. In addition, both plaintiffs condemned as violative of Section 1981 and Title VII two amendatory agreements to the collective bargaining contract entered between Wisconsin Steel and Local 21 which affected employee recall rights and seniority status.

With respect to the seniority system as it relates to Waters, it was established at trial that the collective bargaining agreements between Wisconsin Steel and Local 21 have since 1946 provided for a "last hired, first fired" seniority system for bricklayers employed at Wisconsin Steel. The seniority system gives full credit to all bricklayers for their actual length of service or earned seniority as bricklayers. Seniority vests after a 90-day probationary period and may be broken by various events, including lay-offs in excess of two years. The system governs the order of lay-offs and recalls of bricklayers.

Waters first inquired about employment at Wisconsin Steel in the fall of 1957. He was told that no bricklayers were being hired. Approximately seven years later Waters inquired a second time for employment and was hired in July 1964. Two months later, in September 1964, Waters was laid off according to his length of service and before completing his 90-day probationary period and achieving contractual seniority status. Waters' lay-off was one of

several lay-offs during late 1964 and 1965 which occurred as a result of an anticipated decrease in the steel plant's bricklaying needs because of a fundamental change in the steelmaking process. (During this period, Wisconsin Steel was converting from twelve open-hearth brick-lined furnaces to two basic oxygen furnaces, and, consequently, it had been anticipated that the volume of brick maintenance work would be correspondingly reduced.) By March 1965, over thirty bricklayers with up to ten years seniority had been laid off. Wisconsin Steel had expected that over half of the laid-off bricklayers, including eight bricklayers with five to six years seniority, would not be recalled within the two-year period and that pursuant to the terms of the collective bargaining contract these bricklayers' contractual seniority rights would be lost.

During the course of the next year, however, Wisconsin Steel became aware that it had underestimated its bricklayer requirements for the basic oxygen steelmaking process. The company therefore began recalling bricklayers in the order of their length of prior service.

Besides the contractual right of recall for those employees with contractual rights, Wisconsin Steel had a policy that former employees, including bricklayers who did not have contractual seniority rights would nonetheless be recalled according to their length of service. In March 1967, pursuant to this policy and not because of contractual right of recall, Waters was recalled. Waters accepted reinstatement and continued to work until May 19, 1967 when he was once again laid off because of a temporary reduction in plant operations. Waters was recalled on August 30, 1967, but refused this third offer of employment because he had another job and also, because he believed that his return to Wisconsin Steel might prejudice his then pending EEOC charges against Wisconsin Steel which he had filed in May 1966.

With respect to the amendatory agreements to the collective bargaining contract which plaintiffs challenge as discriminatory, the following evidence was adduced at trial. Prior to 1965, Wisconsin Steel, unlike other steel plants, had no provision for severance pay in its collective bargaining agreement with Local 21. However, in March 1965, after the decision had been made to lay off eight white bricklayers having five to six years seniority, the

company negotiated a "severance agreement" with Local 21, dealing exclusively with these eight employees. The agreement provided that after being laid off the eight bricklayers could elect to retain their contractual seniority rights or receive $966.00 in severance pay. An election to retain contractual seniority rights carried with it the risk that these bricklayers would lose their seniority rights anyway after two years on lay-off; this risk was believed to be substantial in view of Wisconsin Steel's anticipated decline in bricklaying needs. Consequently, the eight bricklayers, subsequent to their involuntary lay-off pursuant to seniority, elected to receive severance pay, thereby forfeiting their contractual seniority rights to recall.

As noted earlier, it became apparent to Wisconsin Steel in 1966 that it had underestimated its predicted bricklaying requirement for the basic oxygen process. In view of its new felt demand for bricklayers and its asserted belief that an injustice had been done to the eight bricklayers who had exchanged their contractual seniority rights for $966.00, the company proposed to Local 21 that the March 1965 severance pay agreement be partially nullified by an amendment restoring the eight bricklayers' contractual seniority rights for purposes of recall. Accordingly, an amendatory agreement was entered into in June 1966. Three of the eight white bricklayers who had previously accepted the severance pay also accepted the recall and reurned to work, two in July 1966 and the third in January 1967. In each instance the man was rehired without reapplying with the company for employment.

At trial plaintiffs contended that the June 1966 amendatory agreement was, in effect, discriminatory for it restored contractual seniority status to the three white bricklayers who accepted recall and thereby advanced those three bricklayers ahead of Waters and Samuels on the hiring and recall roster. The defendants countered plaintiffs' contention by arguing that the three bricklayers would have been entitled to prior recall in any event pursuant to the company policy whereby former employees without contractual rights of recall are nevertheless recalled pursuant to their length of prior service.

After submission of the evidence the trial judge made certain findings of fact. He also made the following conclusions of law:

"4. Prior to April, 1964, Wisconsin Steel discriminated in the hiring of bricklayers in violation of 42 U.S.C. § 1981.

5. The seniority system negotiated between defendants Wisconsin Steel and Local 21 had its genesis in a period of racial discrimination and is thus violative of 42 U.S.C. § 1981 and is not a bona fide seniority system under Title VII.

6. By laying off plaintiff Waters in September, 1964, pursuant to the terms of the seniority system of the collective bargaining agreement, defendants violated both § 1981 and Title VII. Defendants also violated § 1981 and Title VII when, in reliance on the seniority system, Wisconsin Steel failed to recall plaintiff Waters in March, 1965, and when it again laid off plaintiff Waters in May, 1967.

7. Defendants June 15, 1966 agreement to amend the earlier severance pay agreement and thereby restore recall rights to an all white group of bricklayers who otherwise possessed no recall rights under the prior severance pay agreement, thereby placing those white bricklayers ahead of black bricklayers, constituted a violation of both § 1981 and Title VII. This violation discriminated against the rights of both plaintiff Waters and plaintiff Samuels."

Pursuant to its decision the district court directed Wisconsin Steel to offer employment to Waters and Samuels and ordered both defendants to share in a back-pay award of $5000 to Waters and $5000 to Samuels. In addition, the court awarded the sum of $5000 as attorneys' fee for plaintiffs' counsel and as a joint liability of the defendants.

We address the following issues in these appeals: (1) Whether the district court properly asserted jurisdiction over either defendant under 42 U.S.C. § 1981; (2) whether an aggrieved plaintiff must exhaust grievance procedures under a collective bargaining agreement before he can initiate a lawsuit under section 1981; (3) whether the trial court's conclusion that defendant Wisconsin Steel discriminated in the hiring of bricklayers prior to April 1964 is clearly erroneous; (4) whether the trial court erred

in concluding that Wisconsin Steel's "last hired, first fired" seniority system is violative of 42 U.S.C. § 1981 and is not a bona fide seniority system under Title VII; (5) whether there was error in holding that defendants' June 15, 1966 agreement to amend the prior severance pay agreement thereby restoring contractual recall rights to an all-white group of bricklayers constituted a violation of section 1981 and Title VII; (6) whether the participation of defendant Local 21 as signatory to the collective bargaining agreement as well as to the two challenged agreements to amend the collective bargaining agreement is sufficient to hold the union liable under section 1981; (7) whether the district court erred in its calculation of the back-pay award; and (8) whether the district court erred in its making the award of attorneys' fees to counsel for the plaintiffs. We affirm in part the district court's finding on liability, but reverse and remand with respect to the questions of back-pay damages and attorney fees.

I

Local 21 opposes the district court's assumption of jurisdiction over it on two grounds: The union contends that the plaintiffs did not justify their failure to file charges against Local 21 with the EEOC under Title VII. In addition, it challenges the standing of Waters to sue the union under section 1981 on the basis that he was not at any relevant time a member of the union.

With respect to the argument of Local 21 that the plaintiffs have failed to prove a reasonable excuse for bypassing the administrative procedures of Title VII, we previously addressed that issue in *Waters* v. *Wisconsin Steel,* 427 F.2d 476 (7th Cir. 1970) where we stated:

> "We hold, therefore, that an aggrieved person may sue directly under section 1981 if he pleads a reasonable excuse for his failure to exhaust EEOC remedies. We need not define the full scope of this exception here. Nevertheless, we believe that plaintiffs in the case at bar have presented allegations sufficient to justify their failure to charge Local 21 before the Commission.
>
> We rely particularly on the following allegations. The primary charge of racial discrimination made by

> plaintiffs is based on an amendment of the collective bargaining agreement between Harvester and Local 21. That amendment occurred in June 1966 after plaintiffs filed their charge before the EEOC. Until this amendment plaintiffs were, at least arguably, unaware of the participation of Local 21 in Harvester's alleged policy of racial discrimination." 427 F.2d at 487.

The evidence adduced at trial supports plaintiffs' allegation that the collective bargaining agreement amendment occurred after the EEOC charge was filed thereby justifying the by-pass of the EEOC. Moreover, we note and are somewhat inclined to agree with the recent decisions which hold that exhaustion of Title VII remedies, or reasonable excuse for failing to do so, is not a jurisdictional prerequisite to an action under section 1981. *See, e.g., Long* v. *Ford Motor Co.*, 42 U.S.L.W. 2599 (6th Cir. April 30, 1974).

As to the contention that Waters lacks standing to sue under section 1981, Local 21 premises its argument on the assertion that jurisdiction under section 1981 is dependent on a contractual relationship between Waters and the union (which did not exist here for Waters was not a member of the union). Section 1981 assures that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." The subject matter of this suit is cognizable under section 1981 for Waters complains that his right to enter into an employment contract with the company on the same basis as whites was impaired by the joint action of the union and company. It follows that his nonmembership in the union has no bearing on his section 1981 claim against Local 21.[1]

II

Local 21 contends that plaintiffs should be barred from proceeding against the union under section 1981 because they failed to exhaust their contractual remedies under the collective bargaining agreement. The nature of plain-

[1] In addition, jurisdiction over Wisconsin Steel was properly entertained under both Title VII and section 1981.

tiffs' claims however is that of a complaint against racial discrimination in employment and not a labor law action, asserting rights under a collective bargaining contract. Indeed, the focus of this civil rights suit is an attack by plaintiffs on the contract itself as embodying racially discriminatory practices.

Title VII and section 1981 are "parallel or overlapping remedies against discrimination." *Alexander* v. *Gardner-Denver Co.*, No. 72-5847, at p. 10 (U.S. 1974). Consequently, in fashioning a substantive body of law under section 1981 the courts should, in an effort to avoid undesirable substantive law conflicts, look to the principles of law created under Title VII for direction. It is well-established that under Title VII there is no exhaustion of contractual remedies requirement. *Alexander* v. *Gardner-Denver Co., supra,* at p. 12; *Rios* v. *Reynolds Metal Co.*, 467 F.2d 54, 57 (5th Cir. 1972); *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969). Moreover, an exhaustion of remedies requirement does not appear to apply to claims for relief brought under any of the civil rights acts. *See Monroe* v. *Pape*, 365 U.S. 167 (1960); *McNeese* v. *Board of Education*, 373 U.S. 668 (1963); *D'Amico* v. *California*, 389 U.S. 416 (1967); and *King* v. *Smith*, 392 U.S. 309 (1968).[2] We are of the view, therefore, that plaintiffs could properly proceed against the union under section 1981 without first exhausting any contractual remedies under the collective bargaining agreement.

III

Wisconsin Steel contends that the evidence does not support the district court's holding that "[p]rior to April, 1964, Wisconsin Steel discriminated in the hiring of bricklayers in violation of 42 U.S.C. § 1981." We believe the record supports the conclusion that Wisconsin Steel engaged in racially discriminatory hiring policies with respect to the position of bricklayer prior to the enactment of Title VII.

Wisconsin Steel did not hire its first black bricklayer until April 1964 although blacks had made inquiries seeking employment as early as 1947. In addition, the evi-

[2] Although these cases treated the exhaustion of remedy requirement with respect to 42 U.S.C. § 1983 of the Civil Rights Act, we think the Court's analysis is applicable to actions brought under 42 U.S.C. § 1981.

dence reflects a discriminatory departmental transfer policy whereby blacks hired by Wisconsin Steel as laborers were denied the opportunity available to white laborers to transfer to the bricklayers' apprenticeship program.

It is urged by the company that the "single statistic" of no black bricklayers prior to 1964 is not sufficient to make a showing of discrimination. Although we doubt the validity of this contention (*see Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245, 247 (10th Cir. 1970); *Parham* v. *Southwestern Bell Tel. Co.*, 433 F.2d 421, 426 (8th Cir. 1970)), we think that the statistical data joined by the evidence indicating repeated attempts by blacks to obtain employment as bricklayers substantiates the trial court's finding of discrimination.

Wisconsin Steel further contends that plaintiffs did not make a showing of past racial discrimination because they failed to prove that black applicants were denied actual job openings. Relying on *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), the defendant in effect urges that discrimination can only be shown if there is a precise matching of job openings and job applicants. While a showing of matching might be required where the focus of inquiry is on an "individualized hiring decision," such as in *McDonnell Douglas*,[3] we do not believe such a showing is required, where, as here, the inquiry centers on whether the employer engaged in discriminatory hiring procedures or practices in the past unrelated to the subsequent employment applications. Accordingly, we do not find *McDonnell Douglas* controlling on this issue.

IV

With respect to the validity of Wisconsin Steel's employment seniority system which embodies the "last hired,

[3] In *McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973), the Court stated that a plaintiff in a Title VII case establishes a prima facie case of discrimination by showing:

> "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S. at 802.

In referring to the foregoing elements, the Court stated in a footnote:

> "The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." 411 U.S. at 802, fn. 13.

first fired" principle of seniority for job recalls and layoffs, the district court held:

> "5. The seniority system negotiated between defendants Wisconsin Steel and Local 21 had its genesis in a period of racial discrimination and is thus violative of 42 U.S.C. § 1981 and is not a bona fide seniority system under Title VII.
>
> 6. By laying off plaintiff Waters in September, 1964, pursuant to the terms of the seniority system of the collective bargaining agreement, defendants violated both § 1981 and Title VII. Defendants also violated § 1981 and Title VII when, in reliance on the seniority system, Wisconsin Steel failed to recall plaintiff Waters in March, 1965, and when it again laid off plaintiff Waters in May, 1967."

The plaintiffs contend that Wisconsin Steel's employment seniority system perpetuates the effects of past discrimination in view of the facts that blacks will be laid off before and recalled after certain whites who might not otherwise have had seniority had Wisconsin Steel not discriminated in hiring prior to 1964. They argue that such a system facilitates a return to the status quo of the era when Wisconsin Steel hired no black bricklayers. Wisconsin Steel argues, however, that an employment seniority system which accords workers credit for the full period of their employment is racially neutral and as such is a bona fide seniority system within the contemplation of § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h). The defendant says that to strike down its employment seniority system would be to countenance reverse discrimination.

It is asserted that here there is an employment seniority system (unlike the departmental or job seniority systems which courts have modified under Title VII) which grants workers equal credit for actual length of service with the employer. Under a departmental seniority system, seniority is measured by length of service in a department while a job seniority system accords seniority on the basis of length of service on a job. The decisions modifying these two forms of seniority systems have routinely involved situations where the employer previously maintained segregated work forces, prohibiting transfers by blacks into various jobs or departments which offered

improved employment conditions. With the advent of Title VII the employer would facially lift the restrictions on transfers but would effectively prohibit transfers through a department or job seniority policy whereby blacks would be given no credit for their previous years of employment with the employer and would be placed at the bottom of the employee roster in the formerly all-white job or department to which they transferred. Often in modifying these discriminatory forms of seniority systems the courts have deployed an employment seniority system as a racially neutral and adequate remedy to the discriminatory impact of the prior seniority systems.

We are of the view that Wisconsin Steel's employment seniority system embodying the "last hired, first fired" principle of seniority is not of itself racially discriminatory or does it have the effect of perpetuating prior racial discrimination in violation of the strictures of Title VII. To that end we find the legislative history of Title VII supportive of the claim that an employment seniority system is a "bona fide" seniority system under the Act. The history points out that:

> "Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them *special seniority rights at the expense of the white workers hired earlier.* (However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination.)" Interpretative Memorandum of Senators Clark and Case, 110 Cong. Rec. 7213 (April 8, 1964). (Emphasis added).

In response to written questions by Senator Dirksen, one of the Senate floor managers for the bill, Senator Clark,

emphasized that the "last hired, first fired" principle of seniority would be preserved under Title VII:

> "Question. Would the same situation prevail in respect to promotions, when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? Normally, labor contracts call for 'last hired, first fired.' If the last hired are Negroes, is the employer discriminating if his contract requires that they be first fired and the remaining employees are white?"
>
> "Answer. Seniority rights are in no way affected by the bill. If under a 'last hired, first fired' agreement a Negro happens to be the 'last hired,' he can still be 'first fired' as long as it is done because of his status as 'last hired' and not because of his race." 110 Cong. Rec. 7217 (April 8, 1964).

Moreover, to alleviate any further doubt as to the meaning of Title VII, Senator Clark obtained an interpretative memorandum from the Department of Justice which indicated that "last hired, first fired" seniority rules would be valid under Title VII:

> "Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is low man on the totem pole he is not being discriminated against because of his race." 110 Cong. Rec. 7207 (April 8, 1964).

In *Quarles* v. *Philip Morris, Inc.*, 279 F.Supp. 505 (E.D. Va. 1968), the district court was faced with a proposal by the plaintiffs, akin to that presented here, in derogation

of the employment seniority of white workers. There, after a thorough analysis of the legislative history of Title VII, Judge Butzner wrote:

> "[T]he plaintiffs' proposal, while not ousting white employees from present jobs, would prefer Negroes even though they might have less employment seniority than whites. Nothing in the act indicates this result was intended." 279 F.Supp. at 519.

Similarly, the Fifth Circuit in passing upon the legislative history of Title VII stated:

> "No doubt, Congress, to prevent 'reverse discrimination' meant to protect certain seniority rights that could not have existed but for previous racial discrimination. For example a Negro who had been rejected by an employer on racial grounds before passage of the Act could not, after being hired, claim to outrank whites who had been hired before him but after his original rejection, even though the Negro might have had senior status but for the past discrimination. As the court pointed out in *Quarles*, the treatment of 'job' or 'department seniority' raises problems different from those discussed in the Senate debates: 'a department seniority system that has its genesis in racial discrimination is not a bona fide seniority system.'" 279 F.Supp. at 517.
>
> "It is one thing for legislation to require the creation of *fictional* seniority for newly hired Negroes, and quite another thing for it to require that time *actually worked* in Negro jobs be given equal status with time worked in white jobs. To begin with, requiring employers to correct their pre-Act discrimination by creating fictional seniority for new Negro employees would not necessarily aid the actual victims of the previous discrimination. There would be no guaranty that the new employees had actually suffered exclusion at the hands of the employer in the past, or, if they had, there would be no way of knowing whether, after being hired, they would have continued to work for the same employer. In other words, *creating fictional employment time for newly-hired Negroes would comprise preferential rather*

> *than remedial treatment.* The clear thrust of the Senate debate is directed against such preferential treatment on the basis of race.
>
> "We conclude, in agreement with *Quarles,* that Congress exempted from the anti-discrimination requirements only those seniority rights that gave white workers preference over junior Negroes." *Local 189, United Papermak & Paperwork* v. *United States,* 416 F.2d 980, 994-95 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970). [Emphasis in original and added].

Title VII mandates that workers of every race be treated equally according to their earned seniority. It does not require as the Fifth Circuit said, that a worker be granted fictional seniority or special privileges because of his race.

Moreover, an employment seniority system is properly distinguished from job or department seniority systems for purposes of Title VII. Under the latter, continuing restrictions on transfer and promotion create unearned or artificial expectations of preference in favor of white workers when compared with black incumbents having an equal or greater length of service. Under the employment seniority system there is equal recognition of employment seniority which preserves only the earned expectations of long-service employees.

Title VII speaks only to the future. Its backward gaze is found only on a present practice which may perpetuate past discrimination. An employment seniority system embodying the "last hired, first fired" principle does not of itself perpetuate past discrimination. To hold otherwise would be tantamount to shackling white employees with a burden of a past discrimination created not by them but by their employer. Title VII was not designed to nurture such reverse discriminatory preferences. *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 430-31 (1971).

We are not, however, insensitive to the plaintiffs' argument, and think employers should be discrete in devising an employment seniority system. We recognize that it is a fine line we draw between plaintiffs' claim of discrimination and defendants' countercharge of reverse discrimi-

nation. On balance, we think Wisconsin Steel's seniority system is racially neutral and does not perpetuate the discrimination of the past.[4]

V

We come finally to the pivotal issue in determining liability: whether the June 15, 1966 agreement between Local 21 and Wisconsin Steel to amend an earlier severance pay agreement and thereby recall three white bricklayers who had accepted severance pay under the initial agreement discriminated against the plaintiffs in violation of Title VII and section 1981. In light of Wisconsin Steel's past history of racially discriminatory hiring practices and the racially neutral yet potentially discriminatory impact of the employment seniority system utilized by the company, we hold that the June 1966 agreement reinstating contract recall rights to three white bricklayers was racially discriminatory with respect to Waters, but not discriminatory with respect to Samuels.

The defendants contend that the restoration of contractual seniority rights to the white bricklayers who had previously accepted severance pay did not discriminate against the plaintiffs for it is claimed that the white bricklayers would have been entitled to prior recall in any event in accordance with company policy. As we noted earlier, that policy, pursuant to which plaintiff Waters was himself recalled, provided that former employees without contractual rights of recall would nonetheless be recalled in order of their length of prior service. We do not doubt that a policy favoring recall of a former employee with experience even though white before considering a new black applicant without experience comports with the requirements of Title VII and section 1981. To that end, we do not perceive any discriminatory impact with respect to Samuels who was a new applicant.

With respect to Waters, however, the company policy occupies a different posture. At the outset we note that it is not entirely clear what the company policy was with

[4] Having passed scrutiny under the substantive requirements of Title VII, the employment seniority system utilized by Wisconsin Steel is not violative of 42 U.S.C. § 1981.

respect to the priority status of the white bricklayers who had accepted severance pay vis-à-vis employees such as Waters who possessed no contractual seniority. Even assuming that the priority of the white bricklayers accepting severance pay emanated from a long-standing company policy and not from an *ad hoc* determination, we are inclined to find that aspect of the company policy to be violative of Title VII and section 1981. We reach such a conclusion due to the fact that Wisconsin Steel through its prior discrimination and its implementation of an employment seniority system occupied a racially precarious position—indeed, at the brink of present discrimination. A company policy of according priority to white bricklayers who had accepted the benefits of severance pay would, in our view, project the company into the realm of presently perpetuating the racial discrimination of the past. The company policy is no defense to the defendants' action in entering the June 1966 agreement restoring contractual seniority to three white bricklayers.

We find the June 1966 agreement, therefore, to be discriminatory with respect to Waters. Moreover, it cannot be urged that the agreement was justified by "business necessity." The practice of restoring contractual seniority to white bricklayers who elected to receive severance pay must be justified, if at all, by a showing of "business necessity." *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 431 (1971). In that respect an employment practice "'can be justified only by a showing that it is necessary to the safe and efficient operation of the busines.'" *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 797 (4th Cir. 1971), quoting, *Jones* v. *Lee Way Motor Freight*, 431 F.2d 245, 249 (10th Cir. 1970). Defendants' claim of employee-employer goodwill and alleged concern for fear of potential labor strife does not rise to the level of urgency required for a demonstration of business necessity.

VI

Local 21 contends that there is insufficient evidence to support a claim against the union under section 1981. It is enough, however, that the union was an integral party to the June 1966 amendment which discriminated against

Waters. *Johnson* v. *Goodyear Tire & Rubber Co.*, 7 EPD, ¶9233 (5th Cir. 1974). Local 21 therefore shares jointly in the liability of Wisconsin Steel.

VII

Both Waters and defendants join in the contention that the district court erred in calculating the back-pay award to which Waters is entitled. We agree that the trial judge abused his discretion in fashioning the back-pay award. The award was the product of an arbitrary calculation entirely devoid of any reasoned approach to the proper measure of damages. Moreover, the district court's consideration of the absence of a racially discriminatory motive on the part of the defendants was improper. The absence of a discriminatory motive is not a proper basis for denying or limiting relief. *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 804 (4th Cir. 1971).

It would appear from the record that but for the June 1966 agreement, Waters would have been recalled on January 17, 1967 and that he would not have been laid off on May 19, 1967. Waters was tendered reemployment on September 5, 1967, which he declined to accept. In our judgment the discriminatory impact of defendants' June 1966 agreement ended with the tender made to Waters in September. The relevant period for computing damages therefore ranges from January 17, 1967 to September 5, 1967.

Plaintiff Waters' damages for the relevant period are to be determined by measuring the difference between plaintiff's actual earnings for the period and those which he would have earned absent the discrimination of defendants. In determining the amount of Waters' likely earnings but for the discrimination, we reject the notion advanced by Waters that since he could have held two jobs while employed at Wisconsin Steel, defendants are therefore liable not only for his lost earnings with Wisconsin Steel but also for his probable lost earnings from a second job. Recompense for economic loss resulting from racially discriminatory practices does not require that we entertain claims of such a speculative and remote nature.

Accordingly, we remand to the district court for findings with regard to Waters' actual and probable earnings for the relevant period.[5]

VIII

All parties condemn the district court's method of computing the award of attorney fees to the plaintiffs' counsel pursuant to section 706K of Title VII, 42 U.S.C. § 2000e-5(K). Although the determination of reasonable attorney fees is left to the sound discretion of the trial judge, *Weeks* v. *Southern Bell Tele. & Tele. Co.*, 467 F.2d 95, 97 (5th Cir. 1972), we are convinced that the method whereby the judge computed the award of attorney's fee was so lacking of analysis that it constituted an abuse of discretion.

In fashioning a method of analysis to assist in determining the amount of attorney fees properly to be awarded in a Title VII action, we cannot subscribe to the view that attorney fees are to be determined solely on the basis of a formula applying "hours spent times billing rate." We recognize however that such a factor is a consideration in making the ultimate award and indeed it is a convenient starting point from which adjustments can be made for various other elements. Other elements to be considered are set out in the Code of Professional Responsibility as adopted by the American Bar Association:

> Factors to be considered as guides in determining the reasonableness of a fee include the following:
>
> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

---

[5] It would appear that Wisconsin Steel concedes in its brief that Waters would not have been laid off on May 19, 1967 had he been recalled on January 17, 1967. (Defendant's Brief, p. 44.) The record is not clear on this matter. Therefore we direct that there be findings thereon if defendant does not concede the point. It should be noted however that the outer most parameters of defendants' liability extend from January 17, 1967 to September 5, 1967.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

Disciplinary Rule 2-106.

The Code of Professional Responsibility clearly reflects that an award of attorney fees involves the coalescence of many considerations including the reasonableness of the time spent by counsel, the extent of counsel's success, and the complexity of the case. An analysis by the district court which encompasses the foregoing considerations is most assuredly an analysis well within the bounds of trial court discretion. Accordingly, we remand to the district court for reconsideration of attorneys' fees in light of the aforementioned factors.

The judgment of liability is affirmed in part as to plaintiff Waters and reversed as to plaintiff Samuels. In accordance with Circuit Rule 23 we remand for further consideration on the question of damages and award of attorney fees to plaintiff Waters, consistent with the views expressed herein.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

Order of United States Court of Appeals For the Seventh Circuit

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS 60604

November 26, 1974

(68 C 2483)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Before:

HON. LUTHER M. SWYGERT, Chief Judge
" JOHN S. HASTINGS, SR., Circuit Judge
" THOMAS E. FAIRCHILD, Circuit Judge
" WALTER J. CUMMINGS, Circuit Judge
" WILBUR F. PELL, JR., Circuit Judge
" JOHN PAUL STEVENS, Circuit Judge
" ROBERT A. SPRECHER, Circuit Judge
" PHILIP W. TONE, Circuit Judge

WILLIAM WATERS AND DONALD SAMUELS,

Plaintiff-Appellees
Cross-Appellants,

No. 73-1822 thru 73-1824

vs.

WISCONSIN STEEL WORKS OF INTERNATIONAL HARVESTER CO. and UNITED ORDER OF AMERICAN BRICKLAYERS & STONE MASONS, Local 21,

Defendants-Appellees.

Order of United States Court of Appeals
For the Seventh Circuit

On consideration of the petition for rehearing and suggestion that it be heard en banc filed in the above-entitled cause, a vote of the active members of the Court was requested, and a majority of the active members of the Court having voted to deny a rehearing *en banc*,

It Is Ordered that the petition for rehearing and the suggestion that it be heard *en banc* be, and the same are hereby, Denied.

Judge Fairchild voted to grant said petition for rehearing *en banc*.

Judge Pell disqualified himself from consideration of this matter.

APPENDIX C

Findings of Fact, Conclusions of Law and Order

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

No. 68-C-2483

WILLIAM A. WATERS and DONALD SAMUELS,

Plaintiffs,

vs.

WISCONSIN STEEL WORKS OF INTERNATIONAL HARVESTER COMPANY, a Corporation and UNITED ORDER OF AMERICAN BRICKLAYERS AND STONE MASONS, LOCAL 21, an Unincorporated Association,

Defendants.

Following the Court of Appeals remand of this cause to the district court, *Waters* vs. *Wisconsin Steel Works,* 427 F.2d 476 (7th Cir. 1970), it was assigned to my calendar for the purpose of conducting a trial on the issues. Sitting without a jury, I have heard the evidence presented by the parties, considered the exhibits submitted by them and have reviewed the stipulations and supplemental stipulations of fact filed with the court by the parties. At the outset it should be observed that plaintiffs have abandoned the class aspect of their complaint and have limited their request for injunctive relief to the hiring of the two individual plaintiffs. Against this background, I hereby make the following Findings of Fact and Conclusions of Law.

Findings of Fact, Conclusions of Law and Order

FINDINGS OF FACT

1. The stipulations and supplemental stipulations of fact are, to the extent not expressly referred to herein, specifically incorporated by reference and made a part hereof.

2. Plaintiffs William Waters and Donald Samuels are Negro bricklayers residing in Chicago, Illinois and are citizens of the United States.

3. Since the 1920's, defendant Wisconsin Steel Works of International Harvester (hereafter "Wisconsin Steel") has maintained a permanent crew of bricklayers.

4. The number of bricklayers employed at Wisconsin Steel has varied since 1950 between 15 and 58.

5. Since 1944, collective bargaining agreements between Wisconsin Steel and United Order of American Bricklayers and Stone Masons, Local 21 (hereafter "Local 21") have contained seniority provisions relating to layoff, recall and fringe benefits for bricklayers employed at Wisconsin Steel for ninety consecutive days.

6. On August 15, 1962, defendants Wisconsin Steel and Local 21 entered into a collective bargaining agreement.

7. The collective bargaining agreement provided, in pertinent part, that seniority was broken only when (1) "an employee voluntarily leaves the company's service" and (2) "due to layoff because of no work, a period of more than two years has elapsed since the employee last worked for the Company."

8. Under the collective bargaining agreement, employees on layoff for more than two years retained recall priority in the order of their former seniority.

9. It was the policy of Wisconsin Steel to recall laid off employees who had not yet acquired seniority or who had had their seniority broken by the length of the layoff prior to hiring new applicants.

10. Prior to April of 1964, Wisconsin Steel had hired no Negro bricklayers.

11. On at least three occasions between 1949 and 1957, Negro bricklayers sought employment at Wisconsin Steel.

12. Prior to October 9, 1967, Wisconsin Steel had hired no Negro apprentice bricklayers.

13. On at least three occasions prior to October, 1967, Negro laborers in the mason department at Wisconsin Steel had sought to transfer to Wisconsin Steel's apprentice program.

14. The Negroes who had so applied were told that their applications were rejected on the ground that they were too old.

15. One of the rejected bricklayers was told that the age limit was 25 years of age.

16. One of the rejected Negro laborers was less than 25 years of age when his application was denied.

17. A 29 year old white bricklayer was hired into the apprentice program shortly after a Negro laborer had been rejected.

18. In April, 1964, Wisconsin Steel hired its first Negro bricklayer. In Jlne, 1964, four more Negro bricklayers were hired including the plaintiff William Waters.

19. In September, 1964, the latter four Negro bricklayers were laid off pursuant to the seniority provisions of the collective bargaining agreement.

20. On March 2, 1965, defendants Local 21 and Wisconsin Steel entered into a severance pay agreement.

21. The remaining Negro bricklayer was laid off on March 3, 1965 pursuant to the seniority provision of the collective bargaining agreement.

22. Approximately eight white bricklayers also laid off on March 3, 1965 were eligible to accept severance pay and chose to accept severance pay.

23. The election to accept severance pay constituted a severance of the employment relationship under the collective bargaining agreement.

24. On approximately April 2, 1966, the plaintiffs William Waters and Donald Samuels mailed applications for employment as bricklayers to Wisconsin Steel.

25. On June 15, 1966, defendants Wisconsin Steel and Local 21 entered into an agreement to amend the March 2, 1965 severance pay agreement.

26. Three white bricklayers who had accepted severance pay in March of 1965, accepted recall by Wisconsin Steel during June and July, 1966 and January, 1967, respectively.

27. In March, 1967, plaintiff Waters was recalled and returned to work and was thereafter laid off in May, 1967.

28. Plaintiff Waters was recalled in August of 1967 but declined the offer of employment for the stated reasons that acceptance of such employment might prejudice his charge then pending before the E E O C.

29. If defendants had not amended their March 2, 1965 severance pay agreement, those white bricklayers who elected to accept severance pay would have had no recall priorities under the seniority provisions of the prior collective bargaining agreement.

CONCLUSIONS OF LAW

1. The court has jurisdiction of this action and the parties thereto pursuant to § 706 (f) of Title VII, 42 U S C § 2000e-5 (f) and 28 U S C § 1341 and § 1343.

2. Defendant International Harvester Company is a foreign corporation, licensed to do business in Illinois and is an employer within the meaning of Title VII. International Harvester operates a steel plant known as Wisconsin Steel Works which is located in Cook County, Illinois.

3. Defendant Local 21 is a labor organization representing bricklayers employed in Cook County, Illinois and is engaged in an industry affecting commerce within the meaning of Title VII.

4. Prior to April, 1964, Wisconsin Steel discriminated in the hiring of bricklayers in violation of 42 U S C § 1981.

5. The seniority system negotiated between defendants Wisconsin Steel and Local 21 had its genesis in a period of racial discrimination and is thus violative of 42 U S C 1981 and is not a bona fide seniority system under Title VII.

6. By laying off plaintiff Waters in September, 1964, pursuant to the terms of the seniority system of the collective bargaining agreement, defendants also violated § 1981 and Title VII. Defendants also violated § 1981 and Title VII when, in reliance on the seniority system, Wisconsin Steel failed to recall plaintiff Waters in March, 1965, and when it again laid off plaintiff Waters in May, 1967.

7. Defendants' June 15, 1966 agreement to amend the earlier severance pay agreement and thereby restore recall rights to an all white group of bricklayers who otherwise possessed no recall rights under the prior severance pay agreement, thereby placing those white bricklayers ahead of black bricklayers, constitutes a violation of both § 1981 and Title VII. This violation discriminated against the rights of both plaintiff Waters and plaintiff Samuels.

ORDER

1. By reason of the above described violations of § 1981 and Title VII, the defendant Wisconsin Steel is hereby directed to offer the plaintiffs Waters and Samuels employment as bricklayers in its steel plant known as Wisconsin Steel Works and located in Cook County, Illinois.

2. Pursuant to 42 U S C § 2000e-5 (g), and in the exercise of the court's discretion thereunder, the plaintiffs Waters and Samuels are awarded as and for back pay from the Defendants Wisconsin Steel and Local 21, the

sum of $5,000.00 for each plaintiff. In exercising this discretion, I have noted and considered the absence of a racially discriminatory motive on the part of the two defendants. Although the absence of a specific intent to discriminate does not act as a bar to a back pay award, *Robinson* v. *Lorillard Corporation*, 444 F.2d 791, 804 (4th Cir. 1971), it is a proper element of consideration in the exercise of the court's discretion under 42 U S C § 2000e-5 (g). Considering this and the other circumstances of this case, I have made what I consider to be a generous back pay award.

3. As and for reasonable attorneys' fees, counsel for the plaintiffs are hereby awarded from the defendants the sum of $5,000.00. In making the award for reasonable attorneys' fees, I have considered the efforts expended by plaintiffs' counsel both in the Court of Appeals and in the district court.

CAMPBELL
District Judge

Date: May 2, 1973

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1969
JANUARY SESSION, 1970

No. 17895

WILLIAM WATERS and DONALD SAMUELS, each individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

WISCONSIN STEEL WORKS OF INTERNATIONAL HARVESTER COMPANY, a corporation, and UNITED ORDER OF AMERICAN BRICKLAYERS AND STONE MASONS, LOCAL 21, an unincorporated association,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

APRIL 28, 1970

Before SWYGERT, *Chief Judge*, CASTLE, *Senior Circuit Judge*, and FAIRCHILD, *Circuit Judge*.

SWYGERT, *Chief Judge*. This appeal raises important questions concerning the availability and scope of various federal remedies for combating racial discrimination in employment. Plaintiffs, William Waters and Donald Samuels, brought a class action seeking damages and injunctive relief against the Wisconsin Steel Works of International Harvester Company and Local 21, United Order of American Bricklayers and Stone Masons. They alleged that Harvester, with the assistance of Local 21, maintained a discriminatory hiring policy designed to exclude Negroes, including the plaintiffs, from employment as bricklayers at Wisconsin Steel Works. Plaintiffs

claimed that these allegations of racial discrimination stated a cause of action under four separate statutes: section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981; Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e to e-15; section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a); and the National Labor Relations Act, 29 U.S.C. §§ 151 to 167.[1] On the motion of defendants the district court dismissed plaintiffs' complaint. The plaintiffs appeal from the order of dismissal. We reverse and remand for trial.

In this appeal we must determine whether plaintiffs have stated a cause of action under any of the statutory grounds cited in their complaint. We treat the district court's dismissal of the complaint as a summary judgment for the defendants and consider the affidavits presented in the district court to supplement the bare allegations of the complaint.[2]

The facts as alleged in the complaint and supplemented by affidavits are not in material dispute. Harvester employs over forty-five hundred persons at Wisconsin Steel Works in Chicago, including a small force of bricklayers (less than fifty men). Local 21 is the exclusive bargaining representative for the bricklayers employed by Harvester.

The complaint alleges that prior to June 1964 Harvester, with the acquiescence of Local 21, maintained a discriminatory hiring policy which excluded Negroes from

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[1] Plaintiffs withdrew their claim under the National Labor Relations Act in the district court. Although the allegation of jurisdiction under that provision has not been stricken from the complaint, it was not reasserted on appeal. We, therefore, deem it to be waived. *See* III-B, *infra*.

[2] The district court's order of dismissal was not denominated as a summary judgment for the defendants. Nevertheless, affidavits were submitted by both sides and were not excluded by the court. From its memorandum opinion it is evident that the district court considered these affidavits. Moreover, all parties have relied on affidavits to some extent in this appeal. See FED. R. CIV. P. 12(c).

employment as bricklayers. During June 1964 five Negroes, including William Waters, were hired as bricklayers. Waters, a member of Local 21, worked in that capacity from June 13, 1964 until he was laid off on September 11, 1964. Nine other bricklayers including all of the Negroes hired in June were discharged at that time.

Under the collective bargaining agreement workers achieve seniority only after ninety consecutive days on the job. Thus all of the Negro bricklayers hired in June 1964 worked as probationary employees and did not acquire seniority and the accompanying right to preferential reinstatement when bricklayer jobs were again available. Plaintiffs allege that this seniority system, agreed to by Local 21, is part of a systematic attempt to exclude Negroes from employment as bricklayers.

In April 1966 Waters sought but was not offered reemployment with Harvester. At the same time, Donald Samuels, a member of Local 21, also applied for employment with Harvester as a bricklayer. Samuels, who had not previously worked for Harvester, was denied employment.

On May 20, 1966 Waters and Samuels filed charges with the Illinois Fair Employment Practices Commission alleging that Harvester refused to hire them as bricklayers on account of their race. Three days later the same charges were filed with the Equal Employment Opportunity Commission. On February 16, 1967 the EEOC found that no reasonable cause existed to believe that Harvester violated Title VII of the Civil Rights Act.[3]

---

[3] On March 8, 1967 Waters and the other bricklayers discharged in September 1964 were offered reemployment. Believing that he had been unsuccessful in his action before the EEOC, Waters accepted employment and worked as a bricklayer from March 20 until May 19, 1967 when he was again discharged. In August 1967 he was again offered employment by Harvester but refused since his petition for reconsideration was then pending before the EEOC.

In March 1967 plaintiff Waters petitioned for reconsideration of the EEOC's finding and provided the following additional allegations to support his request. In September 1965 a number of white bricklayers on layoff status elected to receive severance payments. By accepting severance pay under the collective bargaining agreement these bricklayers lost all rights to preferential reinstatement and became eligible for reemployment on the same basis as new employees. Subsequently, on June 15, 1966 Harvester and Local 21 amended their collective bargaining agreement to restore seniority to eight white bricklayers whose seniority had been lost after receiving severance pay. Three of these bricklayers were offered and accepted employment. Restoration of seniority to the remaining five workers relegated plaintiffs to a list further away from recall. As a result plaintiffs alleged that their applications for employment were not given equal consideration and that reemployment of the three white workers and restoration of seniority to all eight bricklayers perpetuated Harvester's continuing policy of hiring only white bricklayers.

On June 14, 1967 the EEOC granted Waters' request for reconsideration. On July 10, 1968 the EEOC withdrew its previous decision and issued a new finding that "reasonable cause exists to believe that respondent [Harvester] violated Title VII of the Civil Rights Act of 1964. . . ." On November 29, 1968 the EEOC notified Waters and Samuels that its conciliation efforts with Harvester had failed and provided them with notice of their right to sue.

On December 27, 1968 plaintiffs filed their complaint in the district court against Harvester and Local 21. The district court gave numerous grounds for dismissing the complaint. The court held that the Supreme Court's holding in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), could not be extended to create a cause of action for "private" racial discrimination in employment under

42 U.S.C. § 1981. The court further held that even if such a cause of action existed prior to 1964, it was, nevertheless, preempted by the enactment of Title VII of the 1964 Civil Rights Act. Furthermore, the court concluded that any action under section 1981 would be barred by the 120-day filing period of the Illinois Fair Employment Practices Act.

The district court disposed of plaintiffs' Title VII count against Local 21 by holding, pursuant to section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e), that Local 21 could not be joined as a defendant since plaintiffs had not previously charged the union with discriminatory practices in a proceeding before the EEOC. The court further held the action against Harvester should also be dismissed since Local 21 and individual white bricklayers could be adversely affected if plaintiffs' action continued, thereby making Local 21 and the bricklayers, parties "needed for just adjudication" under Rule 19, Federal Rules of Civil Procedure.

Finally, the court held that the failure of plaintiffs to exhaust the grievance and arbitration procedures under the contract precluded suit under section 301(a) of the Labor-Management Relations Act. In a footnote the court also stated that plaintiffs failed to state a cause of action under the National Labor Relations Act, since exclusive jurisdiction under that Act is vested in the National Labor Relations Board.

The central issue in this appeal is whether Local 21 can be sued directly in the district court without previously being charged before the EEOC. If Local 21 is properly a defendant, full relief can be granted and the applicability of Rule 19, FED.R.CIV.P. need not be considered. We hold that a right to sue under section 1981 for "private" racial discrimination in employment existed prior to 1964. By enacting Title VII of the 1964 Civil Rights Act, Congress did not repeal this right to sue.

However, in order to avoid irreconcilable conflicts between the provisions of section 1981 and Title VII, a plaintiff must exhaust his administrative remedies before the EEOC unless he provides a reasonable excuse for his failure to do so. Since we find on the basis of the material before us that plaintiffs have sufficiently justified their failure to charge Local 21 before the EEOC, we hold that the district court erred in dismissing plaintiffs' complaint against the union. Accordingly, we reverse for trial on the merits of plaintiffs' complaint against Local 21 under section 1981 and against Harvester under Title VII.

I. The Existence of a Right To Sue Under Section 1981

In *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the Supreme Court was asked to determine the scope and constitutionality of 42 U.S.C. § 1982.[4] In its original form section 1982 was part of section 1 of the Civil Rights Act of 1866.[5] The Court held that section 1 and

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[4] 42 U.S.C. § 1982 reads: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

[5] Section 1 of the Civil Rights Act of 1866 provided:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

its derivative, section 1982, prohibit "*all* racial discrimination, private as well as public, in the sale or rental of property. . . ." *Jones, supra,* at 413. The constitutionality of section 1982 was upheld on the basis of Congress' power to enact legislation to enforce the thirteenth amendment.[6]

Plaintiffs argue by analogy to the *Jones* case that 42 U.S.C. § 1981[7] is also derived from section 1 of the Civil Rights Act of 1866; that it is a valid exercise of congressional power under the thirteenth amendment; and that it is intended to prohibit private racial discrimination in employment by companies and unions. We agree.

There can be little doubt that section 1981, as well as section 1982, is derived directly from section 1 of the 1866 Civil Rights Act. In this judgment we rest primarily on the views expressed by the Supreme Court in the *Jones* case. In footnote 78, the Court said that "the right to contract for employment [is] a right secured by 42 U.S.C. § 1981 (. . . derived from § 1 of the Civil Rights

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[6] The thirteenth amendment provides:

Section 1:

Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2:

Congress shall have power to enforce this article by appropriate legislation.

[7] 42 U.S.C. § 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Act of 1866. . . .)" *Jones, supra,* at 442. This statement is buttressed by further mention of the derivation of section 1981 in footnote 28, *Jones, supra,* at 422.

The Supreme Court's view of the genesis of section 1981 is also supported by our own analysis. In 1870 Congress reenacted section 1 of the 1866 Act as section 18 of the 1870 Civil Rights Act. As part of the 1870 Act Congress also adopted section 16 which is similar, although somewhat broader, than section 1 of the 1866 Act. For purposes of determining the derivation of section 1981 we believe the enactment of section 16 of the 1870 Act is superfluous since section 18 is sufficiently broad to include the provisions of section 1981. This conclusion is supported by the failure of defendants to present legislative history to demonstrate that Congress intended to narrow the scope of the right "to make and enforce contracts" provision of section 1 of the 1866 Act by the enactment of section 16. In fact, a contrary intent is more likely since Congress by enacting section 16 undoubtedly was attempting to insure that the right to make and enforce contracts without regard to race was supported by the fourteenth as well as the thirteenth amendment.[8]

From the discussion in the *Jones* case, it is also evident that section 1981, as part of section 1 of the 1866 Act, was a valid exercise of Congress' power to enact legislation under the thirteenth amendment We rest particularly upon the Supreme Court's analysis of *Hodges* v. *United States,* 203 U.S. 1 (1906). In *Hodges* a group of white workers were prosecuted under section 1981 for terrorist activities conducted against Negro employees of a saw mill. The Supreme Court reversed the defendants' conviction, holding that section 1981 was not designed to prohibit private acts of discrimination. The Court in *Jones* examined the decision in *Hodges* and ruled:

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[8] The fourteenth amendment was not adopted until 1868.

> The conclusion of the majority in *Hodges* rested upon a concept of congressional power under the Thirteenth Amendment irreconcilable with the position taken by every member of this Court in the Civil Rights Cases and incompatible with the history and purpose of the Amendment itself. Insofar as *Hodges* is inconsistent with our holding today, it is hereby overruled. *Jones, supra,* at 442-43 n. 78.[9]

Every indicia of congressional intent points to the conclusion that section 1981 was designed to prohibit private job discrimination. The words of the statute, which are almost identical in relevant respects to section 1982, must be construed to extend beyond insuring the bare legal capacity of Negroes to enter into contracts. Thus Congress provided that: "All persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." We are not persuaded that the failure of Congress to expressly mention employment contracts makes section 1981 distinguishable from section 1982. This conclusion is supported by the legislative history of the 1866 Act which demonstrates Congress' intent that section 1 apply to employment contracts. As the Supreme Court noted in Jones:

> The congressional debates are replete with references to private injustices against Negroes—references to white employers who refused to pay their Negro workers, white planters who agreed among themselves not to hire freed slaves without the permission of their former masters. *Jones, supra,* at 427.

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[9] *See generally A. Larson,* NEW LAW OF RACE RELATIONS, 1969 WIS. L. REV. 470.

As an example of Congress' concern are the words of Representative Windom delivered on the floor of the House:

> Its object is to secure to a poor, weak class of laborers the right to make contracts for their labor, the power to enforce the payment of their wages, and the means of holding and enjoying the proceeds of their toil. *Cong. Globe, 39th Cong. 1st Sess.* 1159 (1866).

This explanation of the purpose of section 1 of the 1866 Act demonstrates that Congress contemplated a prohibition of racial discrimination in employment which would extend beyond state action.

Racial discrimination in employment by unions as well as by employers is barred by section 1981. The relationship between an employee and a union is essentially one of contract. Accordingly, in the performance of its functions as agent for the employees a union cannot discriminate against some of its members on the basis of race.[10] *Washington* v. *Baugh Construction Co.*, 61 LC ¶ 9346 at 6908 (W.D.Wash. 1969); *Dobbins* v. *Local 212, IBEW*, 292 F.Supp. 413 (S.D.Ohio 1968).

Defendants make several arguments to refute the existence of a cause of action based on private racial discrimination in employment prior to the enactment of Title VII of the 1964 Civil Rights Act. These arguments merit only brief discussion. Defendants maintain that the *Jones* decision was "foreshadowed" by cases such as *Hurd* v. *Hodge*, 334 U.S. 24 (1948); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Buchanan* v. *Warley*, 245 U.S. 60 (1917), and that, since similar "foreshadowing" is not present under section 1981, the Supreme Court would not extend its ruling in *Jones* to private discrimination in employment contracts. If, by foreshadowing, the defendants mean

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[10] We need not decide whether an employee possesses rights under § 1981 against the union if he is not a member. *See Steele* v. *Louisville & N. R.R. Co.*, 323 U.S. 192, 198-99 (1944).

that the state action concept has sometimes been employed in a flexible fashion to achieve just results, the cases upon which they rely foreshadow the demise of the requirement of state action under section 1981 as well. Furthermore, it is mistaken to suggest that courts have not used similar means to circumvent the requirement of state action in the area of employment contracts. *See Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192, 198-99 (1944).

Defendants also argue that the *Jones* case is distinguishable from the case at bar since property rights have traditionally been subject to greater governmental regulation than other private activity. We disagree. Labor contract relations are subject to governmental regulation nearly as extensive as property rights. Furthermore, we are unclear why defendants' assertion, even if it were true, is relevant in construing section 1981. Finally, defendants maintain that the Jones case should [not] be given retroactive application. This argument is sufficiently answered by the fact that the Supreme Court has already applied the *Jones* case retroactively in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969).

II. Title VII of the Civil Rights Act of 1964

A. Did Title VII repeal section 1981 by implication?

Having established the existence of a cause of action under section 1981 prior to 1964, we must now ascertain whether Congress, by the enactment of Title VII, intended to repeal the right to bring suit for racial discrimination in employment under the former section. The rules governing this determination have been stated by the Supreme Court in *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936):

> The amending act just described contains no words of repeal; and if it effected a repeal of § 25 of the

> 1913 act, it did so by implication only. The cardinal rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible. There are two well-settled categories of repeals by implication —(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest; otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act and will continue to speak, so far as the two acts are the same, from the time of the first enactment.

We need concern ourselves only with the doctrine of repeal by implication since Title VII does not provide for express repeal of previous legislation. Furthermore, the second category of repeal by implication noted by the Supreme Court is inapplicable since section 1981 covers rights other than the right to contract for employment.

Defendants argue that Title VII was intended by Congress to be a comprehensive scheme to eliminate racial discrimination in employment thereby automatically abolishing all rights previously existing under section 1981. They point first to the fact that Congress in enacting Title VII was unaware of the possibility that aggrieved persons could bring civil suits under section 1981.[11] They

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[11] They rely especially upon the following statements by Congressman Lindsay:

> The situation in the law as it exists today, without the bill before us having passed, is that any individual can bring an

would distinguish the *Jones* case on this basis since the availability of section 1982 was mentioned in debate over Title VIII of the 1968 Civil Rights Act. *Jones, supra,* at 413-17. After the recent decision in *Sullivan* v. *Little Hunting Park, Inc.,* 396 U.S. 229 (1969), this argument is no longer viable. In *Sullivan* the Supreme Court held that the right to bring suit under section 1982 was unaffected by the enactment of the Public Accommodations provision of the 1964 Civil Rights Act, even though the legislative history of that Act fails to mention section 1982. *Sullivan, supra,* at 237. Thus the relevant question for the purpose of determining whether rights under section 1981 were repealed by implication is not whether Congress was aware of section 1981, but whether the legislative history demonstrates that Congress would have intended repeal if it had been aware of preexisting rights under the 1866 Civil Rights Act.

Contrary to the assertions of defendants, the legislative history of Title VII strongly demonstrates an intent to preserve previously existing causes of action. Thus Congress rejected by more than a two-to-one margin an amendment by Senator Tower to exclude agencies other than the EEOC from dealing with practices covered by Title VII. 110 *Cong. Rec.* 13650-52 (1964). Courts have accordingly held that Title VII does not preempt the jurisdiction of the National Labor Relations Board to hear charges of unfair labor practices based on the union's duty of fair representation. *United Packinghouse, Food & Allied Workers International Union* v. *NLRB,* ——

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action to invoke the protection of the 14th amendment with respect to a deprivation of a constitutionally protected right.

In other words, if there is a custom or usage . . . or if there is a practice which has the force of State power behind it, which has State involvement in it, then today an individual may bring action for an injunction. 110 *Cong. Rec.* 1966 (1964).

F.2d —— (D.C. Cir. 1969); *Local 12, United Rubber Workers* v. *NLRB*, 368 F.2d 12 (5th Cir. 1966).

Defendants argue, however, that the most important indicia of intent are the provisions established in Title VII itself and that the existence of a cause of action under section 1981 would virtually destroy these provisions. In addition to the availability of immediate access to the courts, they point to large differences in the class of persons covered by Title VII and section 1981 and variations in the substantive prohibitions of the two enactments. We agree that the difficulties in reconciling section 1981 and Title VII are great and that the areas of possible conflict are numerous. Nevertheless, the *Posadas* case cautions that "the intention . . . to repeal must be clear and manifest" and holds that "effect should be given to both if possible." Thus we cannot conclude that the possibility of conflict demonstrates that section 1981 was wholly repealed by implication.[12] We are convinced that the two acts can, in large measure, be reconciled and effect given to the congressional intent in both enactments. Therefore, we hold that conflicts must be resolved on a case-by-case basis.[13] Accordingly, we turn to section 706(e)[14] to determine whether plaintiffs' cause

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[12] *See generally Comment, Racial Discrimination in Employment Under the Civil Rights Act of 1866*, 36 U. Chi. L. Rev. 615 (1969).

[13] We intimate no views concerning the numerous conflicts between § 1981 and Title VII cited by Local 21 and confine our analysis solely to resolution of those conflicts which are before us in this case.

[14] 42 U.S.C. § 2000e-5(e) provides in relevant part:

> If within thirty days after a charge is filed with the Commission . . . the Commission has been unable to obtain voluntary compliance with this sub-chapter, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge . . . by the person claiming to be aggrieved.

of action under section 1981 against Local 21 can be reconciled with the "charged party" language of Title VII.

B. The effect of section 706(e) on the right to bring suit under section 1981.

Previously in construing section 706(e) this court has held that: "It is a jurisdictional prerequisite to the filing of a suit under Title VII that a charge be filed with the EEOC against the party sought to be sued, 42 U.S.C. § 2000e-5(e)." *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 719 (1969).

Other courts which have considered the question have also held that the "charged party" language of section 706(e) prohibits Title VII suits in the district court against persons not previously charged before the EEOC. *Miller* v. *International Paper Co.*, 408 F.2d 283 (5th Cir. 1969); *Mickel* v. *South Carolina Employment Service*, 377 F.2d 239 (4th Cir.), *cert. denied*, 389 U.S. 877 (1967); *Butler* v. *Local 4, Laborers' Union*, 61 LC ¶ 9348 at 6917 (N.D. Ill. 1969); *Cox* v. *United States Gypsum Co.*, 284 F.Supp. 74 (N.D.Ind. 1968), *modified*, 409 F.2d 289 (7th Cir. 1969); *Sokolowski* v. *Swift & Co.*, 286 F.Supp. 775 (D.Minn. 1968); *Mondy* v. *Crown Zellerbach Corp.*, 271 F.Supp. 258 (E.D. La. 1967); *Moody* v. *Abemarle Paper Co.*, 271 F.Supp. 27 (E.D.N.C. 1967). Since these courts were not presented with arguments concerning the existence of a right to sue under section 1981, the cases cited were properly decided. They do not hold, however, that failure to charge a party before the EEOC precludes suit under section 1981. We hold such suits can be reconciled with section 706(e) and continue to exist in a limited class of cases.

The language of section 706(e) itself does not compel the conclusion that Congress intended to repeal the right to bring suit directly under section 1981. Even though that section, in discussing access to the courts, concentrates

on the situation where an aggrieved party has first proceeded to the EEOC, there is no provision which specifically requires prior recourse before the Commission. Since Congress has expressly prohibited direct access to federal courts in similar situations under other statutes,[15] we hesitate to read section 706(e) as requiring recourse before the EEOC as a jurisdictional prerequisite in all cases.

Furthermore, the legislative history of Title VII fails to conclusively demonstrate that section 706(e) was designed to preclude civil suits by aggrieved parties without prior recourse before the EEOC. Although statements by members of Congress from the floor during debate should be viewed with caution,[16] we note the following assertion by Senator Humphrey, proponent and floor manager of the bill: "[T]he individual may proceed in his own right at any time. He may take his complaint to the Commission, he may by-pass the Commission, or he may go directly to court." (110 *Cong. Rec.* 14 188 (1964).

Despite these indications we are convinced that had Congress been aware of the existence of a cause of action under section 1981, the absolute right to sue under that section would have been modified.[17] Throughout the legislative history of Title VII, Congress expressed a strong prefer-

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[15] *See Age Discrimination in Employment Act of 1967*, 29 U.S.C. § 626(d), where a civil action by a private person is expressly prohibited unless the Secretary of labor is given sixty days' notice during which time he may attempt conciliation.

[16] Contrary statements were made by opponents, including Senator Ervin who described the provisions of section 706(e) as follows: "[T]he bill puts the key to the courthouse door in the hands of the Commission." 110 *Cong. Rec.* 14, 188 (1964).

[17] Our conclusion is not inconsistent with the Supreme Court's holding in *Jones* that the right to proceed directly in federal court under § 1982 is unaffected by the enactment of Title VIII of the 1968 Civil Rights Act, 42 U.S.C. §§ 3601 to 3619. This is true because § 812 of that Act provides an aggrieved party with the

ence for resolution of disputes by conciliation rather than court action. Conciliation was favored for many reasons. By establishing the EEOC Congress provided an inexpensive and uncomplicated remedy for aggrieved parties, most of whom were poor and unsophisticated. Conciliation also was designed to allow a respondent to rectify or explain his action without the public condemnation resulting from a more formal proceeding. Furthermore, the absence of direct government coercion was thought to lessen the antagonism between parties and to encourage reasonable settlement. The need for voluntary compliance was stressed since more coercive remedies were likely to inflame respondents and encourage them to employ subtle forms of discrimination.[18]

Because of the strong emphasis which Congress placed upon conciliation, we do not think that aggrieved persons should be allowed intentionally to by-pass the Commission without good reason. We hold, therefore, that an aggrieved person may sue directly under section 1981 if he pleads a reasonable excuse for his failure to exhaust EEOC remedies. We need not define the full scope of this exception here. Nevertheless, we believe that plaintiffs in the case at bar have presented allegations sufficient to justify their failure to charge Local 21 before the Commission.

We rely particularly on the following allegations. The primary charge of racial discrimination made by plaintiffs

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alternative of by-passing the Secretary of Housing and Urban Development altogether and proceeding directly in a civil action in the district court. Nor is our decision inconsistent with the Supreme Court's holding in *Sullivan* that § 1982 was unaffected by the enactment of Title II of the 1964 Civil Rights Act. Section 207(b) of that title contains an express clause saving prior legislation. *Sullivan, supra,* at 238.

[18] *See generally M. Sovern,* LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT (1966); DISCRIMINATION IN EMPLOYMENT AND IN HOUSING: PRIVATE ENFORCEMENT PROVISIONS OF THE CIVIL RIGHTS ACTS OF 1964 AND 1968, 82 HARV. L. REV. 834 (1969).

is based on an amendment of the collective bargaining agreement between Harvester and Local 21. That amendment occurred in June 1966 *after* plaintiffs filed their charge before the EEOC. Until this amendment plaintiffs were, at least arguably, unaware of the participation of Local 21 in Harvester's alleged policy of racial discrimination. From the affidavits before us, it is evident that Local 21 was aware of the charges against Harvester, and by strong implication against itself, as early as October 1966.[19] Subsequent to this time Local 21 presumably could have rectified any acts of discrimination on its part. Thus Local 21 suffered only slight prejudice from the failure of plaintiffs to charge it before the EEOC.

It is inconceivable that Congress would have intended to do away with the right to sue directly under section 1981 in these circumstances. To do so would bind complainants by the four corners of an informal charge and defeat the effective enforcement of the policies underlying Title VII. *Cf. Choate* v. *Caterpillar Tractor Co.*, 402 F.2d 357 (7th Cir. 1968). At the administrative stage the charge is usually drafted by laymen untrained in the law.

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[19] We note especially the statements of James W. Quisenberry, an investigator for the EEOC, whose affidavit reads in pertinent part:

> In the regular performance of my official duties, pursuant to an investigation of charges filed May 23, 1966, by William Waters and Donald Samuels against the Wisconsin Steel Works, I twice contacted Edward T. Joyce, President of Local 21, United Order of American Bricklayers and Stone Masons. The first meeting occurred in October 1966; and the second meeting took place on August 8, 1967.
>
> In October, 1966, during my first meeting with Edward T. Joyce, I informed him fully of the nature of the charges made by William Waters and Donald Samuels. I informed Mr. Joyce that Waters and Samuels claimed that Wisconsin Steel Works had discriminatorily rejected their employment applications of April 3, 1966.

A requirement that the complainant charge every person who may be involved in the alleged acts of discrimination would be unnecessarily harsh.[20] Nor do we believe that the aggrieved party is protected by the right to amend his charge since amendment procedures are generally beyond the competence of layman complainants.[21] To hold otherwise would be to deny effective relief intended by Congress solely on the basis of procedural defects before the Commission.

Allowing Local 21 to be sued directly in district court under section 1981 is consistent with the flexible interpretation of the requirement of conciliation recently given by other courts. Actual conciliation or even an attempt at conciliation by the EEOC no longer presents a jurisdictional barrier to filing suit in a district court. *Miller* v. *International Paper Co.*, 408 F.2d 283 (5th Cir. 1969); *Johnson* v. *Seaboard Air Line R.R. Co.*, 405 F.2d 645 (4th Cir. 1968), *cert. denied*, 394 U.S. 918 (1969). Moreover, courts have allowed complainants who have not been before the EEOC to join with complainants who have been before the agency as members of a class seeking relief against a common employer. *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); *Oatis* v. *Crown Zellerbach Corp.*,

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[20] The harshness of such a requirement is particularly evident in this case. If this action were dismissed against both Harvester and Local 21, plaintiffs would be forced to file new charges before the EEOC. Section 706(d) of Title VII requires that charges be filed within 210 days after the occurrence of the alleged unlawful employment practice. Unless the failure to hire plaintiffs in April 1966 were considered to be a continuing violation, new charges against Harvester and Local 21 would be deemed untimely and plaintiffs would be left without a remedy.

[21] Defendants argue that the burden of amendment should be placed on Commission members under 42 U.S.C. § 2000e-5(a). We think the fact that the Commission did not attempt to amend plaintiffs' charge in this case demonstrates the inadequacy of such a remedy.

398 F.2d 496 (5th Cir. 1968); *Jenkins* v. *United Gas Corp.*, 400 F.2d 28 (5th Cir. 1968). We think these cases demonstrate that the policy in favor of conciliation should not be transformed into a technical device used to obstruct the enforcement of prohibitions against racial discrimination in employment and to deny relief to those Congress has sought to protect.

The defendants make one final contention in arguing that the district court was correct in dismissing plaintiffs' claim against Local 21. They urge that plaintiffs' action under section 1981 is barred pursuant to 28 U.S.C. § 1652 and 42 U.S.C. § 1988 by the 120-day filing period for a discrimination claim under the Illinois Fair Employment Practices Act, Ill. Rev. Stat. ch. 48 § 851 *et seq.* (1967). We disagree. Under those sections the statute of limitations applicable to civil rights actions is controlled by the statute of limitations which governs the most analogous state action. *Jones* v. *Jones*, 410 F.2d 365 (7th Cir. 1969). We are not convinced that the Illinois F.E.P.A. is the most analogous state action under these provisions. The Illinois act provides only for an administrative remedy and review of the F.E.P.C.'s findings in the state courts. Different considerations obviously apply to suits by private litigants in courts of law. In contrast to the Illinois F.E.P.A., the entire burden of investigating and developing a case under section 1981 lies with the private litigant. Furthermore, the short limitations period contained in the Illinois act is designed to encourage conciliation and private settlement. When an aggrieved party seeks court relief, conciliation has generally failed. Accordingly, the appropriate limitations period in this case is governed by our recent decision in *Baker* v. *F & F Investment* (No. 17815, Jan. 6, 1970). That case held that civil actions under section 1982 are subject to the five-year statute of limitations provided in Ill. Rev. Stat. ch 83 § 16 (1967), governing civil actions not otherwise provided for. Since we see no difference between section 1981 and section 1982 for purposes of determining the appropriate statute of

limitations, plaintiffs' action against Local 21 was timely filed.

We hold that the district court erred in dismissing plaintiffs' complaint against Local 21. Since the relief available to plaintiffs under section 1981 is potentially as broad as that available in their action against Harvester under Title VII, *Sullivan* v. *Little Hunting Park, Inc., supra,* at 238-40, we need not consider the district court's ruling concerning the applicability of Rule 19, FED.R.CIV.P.[22]

III. BREACH OF CONTRACT AND THE DUTY OF FAIR REPRESENTATION

A. Action against Harvester under section 301(a)

Plaintiffs argue that the allegations of their complaint also state a cause of action against Harvester under section 301(a) of the Labor-Management Relations Act as well as under Title VII.[23] We think plaintiffs misconceive the scope and purpose of section 301(a). Nevertheless, these allegations, if liberally construed, are sufficient to withstand a motion to dismiss under that section. Accordingly, we hold that the district court erred in dismissing plaintiffs' action under section 301(a) and order that their cause of action against Harvester for breach of contract be reconsidered on remand of this case.

Section 301(a), unlike Title VII, is not designed primarily as a remedy for racial discrimination in employment.

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[22] Local 21 adequately represents the interests of absent bricklayers thereby refuting the argument that individual white bricklayers are indispensable parties. *Bowe* v. *Colgate-Palmolive Co.,* 416 F.2d 711, 719 (7th Cir. 1969).

[23] Section 301(a), 29 U.S.C. § 185(a) (1965), provides in relevant part:

> Suits for violation of contracts between an employer and a labor organization representing employees . . . or between any such labor organizations, may be brought in any district court of the United States.

Instead, Congress enacted section 301(a) to provide a means by which collective bargaining agreements could be enforced in federal and state courts. Suits under section 301(a) require plaintiffs to allege specifically which provisions of the collective bargaining agreement have been violated by the employer. Plaintiffs' complaint alleges that the agreement amending the collective bargaining agreement entered into by Local 21 and Harvester in June 1966 violated the seniority provisions of the contract. Since parties to a labor contract are always free to amend their agreements, we do not see how an amendment through the ordinary processes of collective bargaining can be considered a breach of contract. *Humphrey* v. *Moore*, 375 U.S. 335, 359 (concurring opinion of Mr. Justice Harlan) (1964). Nevertheless, the complaint along with the accompanying affidavits of plaintiff Waters, if broadly construed, may be read to include allegations that plaintiffs were treated in a discriminatory fashion by Harvester in violation of the contract between Local 21 and Harvester. This construction is sufficient to survive a motion to dismiss. *Czasek* v. *O'Mara*, 38 U.S.L.W. 4151 (Feb. 24, 1970); *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). On remand plaintiffs should be permitted to amend their complaint to allege with greater specificity which provisions of the collective bargaining agreement were violated by Harvester.

To bring an action under section 301(a) an individual employee also must exhaust the grievance provisions of his collective bargaining agreement. *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965). As the Supreme Court held in *Vaca* v. *Sipes*, 386 U.S. 171, 186 (1967):

> [T]he wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance.

In the instant case the affidavit of plaintiff Waters alleges in very general terms that any attempt to seek redress through the grievance mechanism of the contract would be futile.[24] Harvester argues that plaintiffs cannot prove a breach of the duty of fair representation sufficient to satisfy the exhaustion requirement without at least attempting to put the grievance mechanisms into operation by a demand on union officials. We disagree. Although it may be difficult to establish such proof in this case, we can envision situations in which union representatives repeatedly have breached their duty of fair representation in previous dealings with an employee. In such cases the employee could reasonably believe that attempts to seek the aid of the union in presenting a grievance would be utterly futile, thus justifying his failure to exhaust remedies. *Cf. Glover* v. *St. Louis, San Francisco R.R. Co.*, 393 U.S. 324 (1969). As a result we are unable to say beyond a doubt that plaintiffs' allegations of futility are insufficient to excuse their failure to exhaust the grievance provisions of their contract. *Czasek* v. *O'Mara, supra,* slip opinion at 2-3. On remand of this case plaintiffs should be allowed to amend their complaint to allege circumstances supporting their assertion that attempts to persuade Local 21 to pursue their grievances would be futile.

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[24] Waters' affidavit includes the following statements:

> I have repeatedly called upon the union to represent me and to protect me against racial discrimination in employment.
>
> Despite my complaints, the union has failed adequately and fairly to represent me in disputes with employers involving racial discrimination.
>
> • • •
>
> Because Nicholas Popovic is the official through whom I would have to channel any formal complaints . . . and because Local 21 has failed to change its policy of discriminating against black bricklayers, even after receiving numerous complaints from me, I believe that any futher attempts to channel my grievances through the union would be futile.

B. Duty of fair representation action against Local 21

Plaintiffs assert that Local 21 violated its duty of fair representation by participating or at least acquiescing in Harvester's discriminatory hiring policies. They maintain that this breach of duty by Local 21 states a cause of action under section 301(a). Although plaintiffs again read section 301(a) too broadly, we believe that their complaint, if liberally construed, states a cause of action under that section. Therefore, on remand of this case the district court should reconsider plaintiffs' complaint against Local 21 under section 301(a).

Plaintiffs are incorrect in arguing that section 301(a) is intended to provide federal jurisdiction for suits seeking relief for violation of the duty of fair representation, *Sciaraffa* v. *Oxford Paper Co.*, 62 LC ¶ 9396 at 6549 (S.D. Me. 1970). The origin of that duty is statutory, first recognized in cases involving racial discrimination by unions certified as exclusive bargaining agents under the Railway Labor Act. *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1943); *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 120 (1943). The Supreme Court subsequently held that the provisions of the National Labor Relations Act included a similar duty. *Syres* v. *Oil Workers International Union*, 350 U.S. 892 (1955); *rev'g*, 223 F.2d 739 (5th Cir. 1955); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953). Suits for breach of statutory duty may be brought under federal question or civil rights jurisdictional provisions. *Brady* v. *Trans World Airlines, Inc.*, 401 F.2d 87 (3d Cir. 1968); *Williams* v. *Pacific Maritime Assoc.*, 384 F.2d 935 (9th Cir. 1967).[25]

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[25] We do not agree with the district court's conclusion that such suits can only be brought before the National Labor Relations Board. Although the NLRB has assumed jurisdiction and has held that breach of the duty of fair representation constitutes an unfair labor practice under § 8(b)(1)(A), *Miranda Fuel Co.*, 140 N.L.R.B. 181, 185 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963);

The duty of fair representation has only limited relevance to actions under section 301(a). A union can be joined as a defendant under that section, if by breach of its statutory duty, the union has prevented presentment or enforcement of an employee grievance under the collective bargaining agreement.[26] *Vaca* v. *Sipes, supra,* at 197 n. 18. In such cases a plaintiff-employee can recover only for injury which flows solely from the union's own conduct. As a result plaintiff's recovery against the union is limited in most cases to compensation for the union's failure to timely assert an employee grievance against an employer, *Vaca* v. *Sipes, supra,* at 196-98. When viewed in a light most favorable to plaintiffs, we think their complaint makes such an allegation. Accordingly, plaintiffs' cause of action against the union under section 301(a) should be considered on remand.

For the reasons stated, the judgment of the district court is reversed and the cause remanded.

FAIRCHILD, *Circuit Judge* (concurring). I concur in reversal and remand for further proceedings against both defendants. I have reached conclusions which differ in some

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Local 12, United Rubber Workers v. *NLRB,* 368 F.2d 12 (5th Cir. 1966), the Supreme Court has held that the NLRB's jurisdiction is not exclusive. *Vaca* v. *Sipes, supra,* at 178-81. Since plaintiffs have waived their claim that their complaint states a cause of action under the National Labor Relations Act, see n. 1, *supra,* we need not consider the applicability of that Act to the allegations before us.

[26] Unions also can be joined as defendants if the union is a moving force in producing a violation of the contract by the employer, *Vaca* v. *Sipes, supra,* at 197 n. 18. *Cf. Humphrey* v. *Moore,* 375 U.S. 335 (1964). We do not understand plaintiffs to so allege in this case. However, on remand leave should be granted to allow them to make such allegations.

respects from those set forth in Chief Judge Swygert's majority opinion. They are as follows:

(1) *Plaintiffs' right to proceed against Harvester under Title VII.* Plaintiffs allege that Harvester, as an employer, is engaging in what Congress declared an unlawful employment practice. Congress authorized an action for the prevention and redress of such practice, but did not suggest that all parties responsible for the practice or all parties whose interests might be affected by its termination must be joined. In my opinion, Rule 19(b) F.R.C.P. does not authorize dismissal of an otherwise proper Title VII action against an employer on account of the absence of the union and other employees. Such use of Rule 19 would frustrate the intent of Congress in this type of case.

(2) *Plaintiffs' Title VII action against the union.* Plaintiffs allege that the union was a party to Harvester's collective bargaining agreement, containing allegedly discriminatory seniority lists, and that (after the charges were filed with EEOC) the union agreed to a modification, allegedly for the purpose of permitting a discriminatory reinstatement. Sec. 2000e-2(c)(3) declares it an unlawful employment practice for a union "to cause or attempt to cause an employer to discriminate against an individual in violation of this section." The complaint does not use statutory language, but no argument has been made that it failed to allege an unlawful employment practice on the part of the union.

Assuming that the allegation is sufficient, it appears from the complaint that the union was to some degree responsible (in concert with the employer) for the practice of discrimination under attack, acted to further the practice after a charge had been filed against the employer, and had actual notice of the commission's investigation of the charge. Under all the particular circumstances of this case, I conclude that a strict reading of the statutory

authorization of an action "against the respondent named in the charge" is unwarranted, and that the plaintiffs could properly bring action against both the employer and the union.

EEOC filed an amicus brief in which it argued that in this case plaintiffs could properly have joined the union as a defendant without having named it in the administrative charge. EEOC also suggested a procedure by which the defect, if any, could be cured. Under it, the district court would have stayed the action, pending the filing of a charge by plaintiffs against the union. EEOC could then process the charge so as to allow joinder of the union. Such an approach has been employed in other cases, e.g. *Norman* v. *Missouri Pacific Railroad* (8th Cir., 1969), 414 F2d 73; *Local U. No. 329, I.L.A.* v. *South Atlanta & Gulf Coast Dist.* (S.D. Tex., 1968), 295 FSupp. 599. It seems clear that these steps would obviate any jurisdictional question, but under the facts peculiar to this record, it would seem an unnecessary exercise.

(3) *Plaintiffs' possible action under § 1981.* I agree that, given the Supreme Court's *Jones* v. *Mayer* reading of § 1982 with respect to racial discrimination in the sale of property, there is no persuasive reason for reading § 1981 more narrowly with respect to racial discrimination in employment. There remains the difficult question of whether and to what extent the enactment of Title VII restricted reliance upon § 1981. It is unnecessary to resolve that question at this stage if plaintiffs are permitted to proceed against both defendants under Title VII. Perhaps the trial will develop facts which will make resolution important in this case, and I think it wiser not to attempt an answer until that point.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Tuesday, April 28, 1970

Before
Hon. LUTHER M. SWYGERT, Chief Judge
Hon. LATHAM CASTLE, Senior Circuit Judge
Hon. THOMAS E. FAIRCHILD, Circuit Judge

No. 17895

WILLIAM WATERS and DONALD SAMUELS, etc.,
Plaintiffs-Appellants,

vs.

WISCONSIN STEEL WORKS OF INTERNATIONAL HARVESTER COMPANY, etc., et al., *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and that this cause be, and it is hereby, REMANDED to the said District Court, in accordance with the opinion of this Court filed this day.

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 68 C 2483

WILLIAM WATERS and DONALD SAMUELS, each individually and on behalf of all others similarly situated, *Plaintiffs*,

v.

WISCONSIN STEEL WORKS OF INTERNATIONAL HARVESTER COMPANY, a corporation, and UNITED ORDER OF AMERICAN BRICKLAYERS AND STONE MASONS, LOCAL 21, an unincorporated association, *Defendants*,

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Amicus Curiae*.

Memorandum and Order on Motions To Dismiss

The defendants in this class action have moved to dismiss or, in the alternative, for summary judgment. The Equal Employment Opportunity Commission (EEOC) requested and was granted leave to file a brief as a friend of the court. For the reasons set forth below, this court is of the opinion that the motions to dismiss should be granted.

Plaintiff William Waters, a Negro bricklayer, was a probationary employee of the defendant Wisconsin Steel Works of International Harvester Company (Company) from July 13, 1964, to September 11, 1964, and from March 20, 1967, to May 19, 1967. He was offered a position again on August 30 or 31, 1967, but he declined the offer. On September 16, 1964, Waters filed a complaint against the Company with the President's Committee on Equal Employment Opportunity. The complaint was dismissed on March 1, 1965. Plaintiff Donald Samuels, also a Negro bricklayer, has never been employed by the Company, but on April 3, 1966, he submitted an application for employment. On May 20, 1966, the plaintiffs filed charges against

the Company with the Illinois Fair Employment Practices Commission (FEPC), alleging that the Company had discriminated against them. The Illinois FEPC dismissed these charges on August 17, 1966, for lack of substantial evidence. In accordance with Title VII of the 1964 Civil Rights Act, the plaintiffs filed charges with the EEOC against the Company within 30 days after the dismissal by the Illinois FEPC. 42 U.S.C. § 2000e *et seq.* On February 16, 1967, the EEOC found that there existed no reasonable cause to believe that the Company had violated Title VII. On June 14, 1967, the EEOC granted plaintiff Waters request for reconsideration. The EEOC, on July 10, 1968, withdrew its previous "no cause" finding and issued a new decision that the Company had violated Title VII of the 1964 Civil Rights Act by a discriminatory recall of three white bricklayers in June and July, 1966, and January, 1967. The EEOC notified the plaintiffs that its conciliation efforts with the Company had been fruitless and advised them to proceed in a federal district court.

The plaintiffs filed the instant complaint in this court on December 27, 1968, against both the Company and Local 21 of the United Order of American Bricklayers and Stone Masons (Union).[1] The plaintiffs here allege that the defendants practice a racially discriminatory seniority system. Three statutes are invoked by the plaintiffs to support this court's jurisdiction: Section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981; Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq.*, and Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a). Each of these statutes will be treated in turn.[2]

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[1] Both plaintiffs were at one time members of the defendant Union.

[2] The plaintiffs have withdrawn their argument that the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, also supports this court's jurisdiction, since exclusive jurisdiction under that act is vested in the National Labor Relations Board.

THE CIVIL RIGHTS ACT OF 1866

Section 1 of the Civil Rights Act of 1866 provides that

> "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." 42 U.S.C. § 1981.

The question whether state action must be alleged to sustain a claim under Section 1981 is presently unsettled. Prior to the Supreme Court's decision in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), a showing of state action was vital to such a claim. E.g., Civil Rights Cases (*United States* v. *Stanley*), 109 U.S. 3 (1883); *Hurd* v. *Hodge*, 334 U.S. 24 (1948). In *Jones, supra*, it was first held that Section 1982, barring discriminatory practices in real estate dealings, applied to private as well as state action. The *Jones* decision was foreshadowed by earlier decisions which prohibited racial restrictions on the sale of property. *Hurd* v. *Hodge, supra; Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Buchanan* v. *Warley*, 245 U.S. 60 (1917). There is no similar trend of decisions applying the provision under consideration here, Section 1981, to the actions of private parties. The likelihood that the Supreme Court will not extend Section 1981 to private employment contracts is evidenced by the enactment of Title VII of the Civil Rights Act of 1964. Title VII expressly forbids racial discrimination in hiring by private employers and provides more definitive remedies than would be available even if Section 1981 were made applicable to private action. By providing such complete relief under Title VII, Congress did not anticipate the development of a then nonexistent and redundant remedy under Section 1981. An expansionist interpretation of Section 1981 would add little

to the protection of private employment contracts from racial discrimination that is not already available under Title VII and would ignore the apparent congressional intent that Title VII be the exclusive enforcement procedure against discrimination in employment contracts. To now apply Section 1981 unnecessarily to employment contracts would create a body of law independent from and in potential conflict with the detailed congressional scheme regulating employment embodied in Title VII. Therefore, this court concludes that it does not have jurisdiction over this matter by reason of the Civil Rights Act of 1866.

This court observes, however, that even if it did have such jurisdiction, the action would be barred as untimely. Federal courts are required to apply to suits under Section 1981 the limitation period applicable to the most analogous claim under state law. *Hileman* v. *Knable*, 391 F.2d 596 (3rd Cir. 1968); *Mulligan* v. *Schlachter*, 389 F.2d 231 (6th Cir. 1968); *Jones* v. *Jones*, No. 16755 (7th Cir. March 5, 1969). An action alleging discriminatory employment practices under Section 1981 is most analogous to a claim under the Illinois Fair Employment Practices Act, which contains a mandatory 120-day filing period.[8] Ill. Rev. Stat. 1967, ch. 48 § 858. Indeed, the plaintiffs here previously filed charges concerning the subject matter of this complaint with the Illinois FEPC. The practices complained of occurred on specific dates during the years of 1964, 1966 and 1967. The complaint was filed on December 27, 1968. Therefore, even if this court had Section 1981 jurisdiction, the claim would be barred.

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[8] Filing periods which are conditions precedent to suit are often referred to as statutes of limitation. For example, the limitation period in the Federal Employer's Liability Act is referred to as a statute of limitations even though it is a condition precedent to recovery. *Wabash Ry. Co.* v. *Bridal*, 94 F.2d 117, 121 (8th Cir. 1938). See also *Carpenter* v. *Erie R. Co.*, 132 F.2d 362 (3rd Cir. 1942); *Reat* v. *Illinois Cent. R.R.*, 47 Ill.App.2d 267 (1964).

THE CIVIL RIGHTS ACT OF 1964

The Union has moved to dismiss the complaint insofar as it asserts Title VII of the 1964 Civil Rights Act as the basis of this court's jurisdiction, on the ground that the Union was not named in the underlying charge before the EEOC. The company, named in the EEOC charge, agrees and moves to dismiss for failure to join an indispensable party under Rule 19, Federal Rules of Civil Procedure.

In their claim under Title VII, the plaintiffs seek injunctive relief against both the Company and the Union to prohibit enforcement of existing seniority provisions in their collective bargaining agreement, to require publication by both defendants of job openings, to "restructure" the existing seniority system established by their collective bargaining agreement, and to give the plaintiffs seniority over all other bricklayers hired since the date of the alleged acts of discrimination. Under such circumstances, both the Union and the individual bricklayers whose seniority might be adversely affected must be before the court. Title VII provides that "a civil action may . . . be brought against the respondent named in the charge . . . by the person claiming to be aggrieved." 42 U.S.C. § 2000e-5(e). A party not brought before the EEOC, such as the Union here, cannot be sued in a Title VII action in a federal court. *Miller* v. *International Paper Co.*, CCH Empl. Prac. ¶ 9211 (59 Lab. Cas.) (5th Cir. 1969); *Freese* v. *John Morrell & Co.*, CCH Empl. Prac. ¶ 9231 (60 Lab. Cas.) (S.D. Iowa 1966). In *Miller*, the court expressly held that

> [t]his circuit has already made clear—as we have reiterated in this opinion—that charging parties cannot bypass the EEOC. Therefore, *if charges of employment discrimination have not been filed against the union, the appellants' [plaintiffs] right to file suit against the unions has not ripened.* CCH Empl. Prac. ¶ 9211 at 6874. (Emphasis supplied.)

Therefore, this court finds that joinder of the Union as a party to the proceeding brought by the plaintiffs before

the EEOC is a condition precedent to joining the Union in the present case. The plaintiffs having failed to do so require dismissal of the Title VII claim against the Union. Consequently, the plaintiffs' claim against the Company must also be dismissed because the Union and the bricklayers who would be adversely affected in this case are parties "needed for just adjudication" under Rule 19.

THE LABOR MANAGEMENT RELATIONS ACT

The complaint alleges that the plaintiffs were injured by a "direct violation" of the collective bargaining agreement between the Company and the Union, in violation of Section 301(a) of the Labor Management Relations Act. A prerequisite to suit under Section 301(a) is that an employee at least attempt to exhaust exclusive grievance and arbitration procedures established in the bargaining agreement. *Vaca* v. *Sipes*, 386 U.S. 171, 184 (1967); *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 652 (1965); *Ford* v. *General Electric Co.*, 395 F.2d 157 (7th Cir. 1968). The plaintiffs have not even attempted to follow the grievance procedures established by the contract. They have not filed a grievance with the Company, nor have they demanded that the Union represent them in any grievance procedure. The complaint is therefore fatally defective under Section 301(a) since it does not contain an allegation that a formal effort to pursue contractual or administrative remedies would be "absolutely futile." *Glover* v. *St. Louis-San Francisco Railway Co.*, 393 U.S. 324, 331 (1969).

It is therefore ordered that the defendants' motions to dismiss be, and they are hereby granted, and the cause is hereby dismissed.

EDWIN A. ROBSON
Judge

July 14, 1969

APPENDIX G

Civil Rights Act of 1964

Pub. L. No. 88-352, 88th Cong., 1st Sess., 1964, 78 Stat. 241, 253-66; 42 U.S.C. §§ 1971, 2000e—2000e-15; F.C.A. 42 §§ 1971, 2000e—2000e-15

TITLE VII—EQUAL EMPLOYMENT OPPORTUNITY

DEFINITIONS

SEC. 701. For the purposes of this title—

(a) The term "person" includes one or more individuals, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or a State or political subdivision thereof, (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954: *Provided,* That during the first year after the effective date prescribed in subsection (a) of section 716, persons having fewer than one hundred employees (and their agents) shall not be considered employers, and, during the second year after such date, persons having fewer than seventy-five employees (and their agents) shall not be considered employers, and, during the third year after such date, persons having fewer than fifty employees (and their agents) shall not be considered employers: *Provided further,* That it shall be the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of

race, color, religion, sex or national origin and the President shall utilize his existing authority to effectuate this policy.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person; but shall not include an agency of the United States, or an agency of a State or political subdivision of a State, except that such term shall include the United States Employment Service and the system of State and local employment services receiving Federal assistance.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) one hundred or more during the first year after the effective date prescribed in subsection (a) of section 716, (B) seventy-five or more during the second year after such date or fifty or more during the third year,

or (C) twenty-five or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

EXEMPTION

SEC. 702. This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

SEC. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise

adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an

employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this title, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any indi-

vidual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

(i) Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

OTHER UNLAWFUL EMPLOYMENT PRACTICES

SEC. 704. (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

(b) It shall be an unlawful employment practice for an employer, labor organization, or employment agency to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SEC. 705. (a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party, who shall be appointed by the President by and with the advice and consent of the Senate.

* * *

(f) The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise any or all of its powers at any other place. The Commission may establish such regional or State offices as its deems necessary to accomplish the purpose of this title.

(g) The Commission shall have power—

(1) to coopera'e with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;

(2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;

(3) to furnish to persons subject to this title such technical assistance as they may request to further their compliance with this title or an order issued thereunder;

(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them refuse or threaten to refuse to cooperate in effectuating the provisions of this title, to assist in such effectuation by conciliation or such other remedial action as is provided by this title;

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this title and to make the results of such studies available to the public;

(6) to refer matters to the Attorney General with recommendations for intervention in a civil action brought by an aggrieved party under section 706, or for the institution of a civil action by the Attorney General under section 707, and to advise, consult, and assist the Attorney General on such matters.

• • •

PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES

SEC. 706. (a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this title has occurred (and such charge sets forth the facts upon which it is based) that employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the

Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. Any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of this subsection shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

(b) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(c) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice

occurring in a State or political subdivision of a State, which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(d) A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b), such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or

(2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) or the efforts of the Commission to obtain voluntary compliance.

(f) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the plaintiff would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative

action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a).

(h) The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U.S.C. 101-115), shall not apply with respect to civil actions brought under this section.

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under subsection (e), the Commission may commence proceedings to compel compliance with such order.

(j) Any civil action brought under subsection (e) and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code.

(k) In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission

and the United States shall be liable for costs the same as a private person.

SEC. 707. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to

assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

EFFECT ON STATE LAWS

SEC. 708. Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

INVESTIGATIONS, INSPECTIONS, RECORDS, STATE AGENCIES

SEC. 709. (a) In connection with any investigation of a charge filed under section 706, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated

or proceeded against that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation.

(b) The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may for the purpose of carrying out its functions and duties under this title and within the limitation of funds appropriated specifically for such purpose, utilize the services of such agencies and their employees and, notwithstanding any other provision of law, may reimburse such agencies and their employees for services rendered to assist the Commission in carrying out this title. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements and under which no person may bring a civil action under section 706 in any cases or class of cases so specified, or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this title.

(c) Except as provided in subsection (d), every employer, employment agency, and labor organization subject to this title shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom, as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this title or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and

joint labor-management committee subject to this title which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purpose of this title, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which such applications were received, and shall furnish to the Commission, upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may (1) apply to the Commission for an exemption from the application of such regulation or order, or (2) bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief.

(d) The provisions of subsection (c) shall not apply to any employer, employment agency, labor organization, or joint labor-management committee with respect to matters occurring in any State or political subdivision thereof which has a fair employment practice law during any period in which such employer, employment agency, labor organization, or joint labor-management committee is subject to such law, except that the Commission may require such notations on records which such employer, employment agency, labor organization, or joint labor-management committee keeps or is required to keep as are necessary because of differences in coverage or methods of enforcement between the State or local law and the provisions of this title. Where an employer is required by Executive

Order 10925, issued March 6, 1961, or by any other Executive order prescribing fair employment practices for Government contractors and subcontractors, or by rules or regulations issued thereunder, to file reports relating to his employment practices with any Federal agency or committee, and he is substantially in compliance with such requirements, the Commission shall not require him to file additional reports pursuant to subsection (c) of this section.

(e) It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this title involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

INVESTIGATORY POWERS

SEC. 710. (a) For the purposes of any investigation of a charge filed under the authority contained in section 706, the Commission shall have authority to examine witnesses under oath and to require the production of documentary evidence relevant or material to the charge under investigation.

(b) If the respondent named in a charge filed under section 706 fails or refuses to comply with a demand of the Commission for permission to examine or to copy evidence in conformity with the provisions of section 709(a), or if any person required to comply with the provisions of section 709(c) or (d) fails or refuses to do so, or if any person fails or refuses to comply with a demand by the Commission to give testimony under oath, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, have jurisdiction to issue to such

person an order requiring him to comply with the provisions of section 709(c) or (d) or to comply with the demand of the Commission, but the attendance of a witness may not be required outside the State where he is found, resides, or transacts business and the production of evidence may not be required outside the State where such evidence is kept.

(c) Within twenty days after the service upon any person charged under section 706 of a demand by the Commission for the production of documentary evidence or for permission to examine or to copy evidence in conformity with the provisions of section 709(a), such person may file in the district court of the United States for the judicial district in which he resides, is found, or transacts business, and serve upon the Commission a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this title or with the limitations generally applicable to compulsory process or upon any constitutional or other legal right or privilege of such person. No objection which is not raised by such a petition may be urged in the defense to a proceeding initiated by the Commission under subsection (b) for enforcement of such a demand unless such proceeding is commenced by the Commission prior to the expiration of the twenty-day period, or unless the court determines that the defendant could not reasonably have been aware of the availability of such ground of objection.

(d) In any proceeding brought by the Commission under subsection (b), except as provided in subsection (c) of this section, the defendant may petition the court for an order modifying or setting aside the demand of the Commission.

Notices to Be Posted

Sec. 711. (a) Every employer, employment agency, and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from or, summaries of, the pertinent provisions of this title and information pertinent to the filing of a complaint.

(b) A willful violation of this section shall be punishable by a fine of not more than $100 for each separate offense.

* * *

Veterans' Preference

Sec. 712. Nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

Rules and Regulations

Sec. 713. (a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title. Regulations issued under this section shall be in conformity with the standards and limitations of the Administrative Procedure Act.

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this title if he pleads and proves that he failed

to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this title regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this title.

* * *

SEC. 716. (a) This title shall become effective one year after the date of its enactment [July 2, 1964].

(b) Notwithstanding subsection (a), sections of this title other than sections 703, 704, 706, and 707 shall become effective immediately.

(c) The President shall, as soon as feasible after the enactment of this title, convene one or more conferences for the purpose of enabling the leaders of groups whose members will be affected by this title to become familiar with the rights afforded and obligations imposed by its provisions, and for the purpose of making plans which will result in the fair and effective administration of this title when all of its provisions become effective. The President shall invite the participation in such conference or conferences of (1) the members of the President's Committee on Equal Employment Opportunity, (2) the members of the Commission on Civil Rights, (3) representatives of State and local agencies engaged in furthering equal employment opportunity, (4) representatives of private agencies engaged in furthering equal employment opportunity, and (5) representatives of employers, labor organizations, and employment agencies who will be subject to this title.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1350

UNITED ORDER OF AMERICAN BRICKLAYERS AND STONE MASONS, LOCAL 21, *Petitioner,*

vs.

WILLIAM A. WATERS AND DONALD SAMUELS, AND WISCONSIN STEEL WORKS OF INTERNATIONAL HARVESTER COMPANY, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENTS WILLIAM A. WATERS AND DONALD SAMUELS IN OPPOSITION.

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BRIEF OF RESPONDENTS WILLIAM A. WATERS AND DONALD SAMUELS IN OPPOSITION.

Petitioner Union raises four questions for this Court's consideration.

QUESTION 1:

Does 42 U. S. C. § 1981 forbid racial discrimination in private employment; if so, does it prohibit discriminatory practices other than the refusal to hire on the basis of race?

ANSWER:

Yes. In *Johnson* v. *Railway Express Agency, Inc.*, ... U. S. ....., ..., 95 S. Ct. 1716, 1920 (1975) the Court stated

that "it is now well settled among the federal courts of appeals —and we now join them—that § 1981 affords a federal remedy against discrimination in private employment on the basis of race." Also, in *Johnson, supra*, 95 S. Ct. at 1717-18, this Court recognized that § 1981 is directed "to most of the same ends as Title VII," including a private employer's discriminatory "seniority rules and job assignments" and a union's racially segregated memberships, all of which were in issue in *Johnson*.

QUESTION 2:

Does 42 U. S. C. § 1981 require the recall of a black worker who had not been discriminated against in hire over white workers who have a greater period of service for the employer, where none of the affected employees have a contractual right to be recalled?

ANSWER:

The question simply does not arise on record in this case. One question raised below was whether a 1966 amendment to a severance pay agreement negotiated by petitioner and Wisconsin Steel Works in 1965 violated the rights of respondents Waters and Samuels. That amendment restored seniority rights to a group of all-white past employees, who by accepting severance pay had lost their recall rights with the company, and reinstated them *ahead* of a group of black bricklayers. But for this amendment, the black bricklayers would have been recalled first. On this point the trial court found:

> Defendants' June 15, 1966 agreement to amend the earlier severance pay agreement and thereby restore recall rights to an all white group of bricklayers who otherwise possessed no recall rights under the prior severance pay agreement, *thereby placing those white bricklayers ahead of black bricklayers*, constitutes a violation of both § 1981 and Title VII. (App. 28a)[1] (Emphasis added)

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1. For a full exposition of the facts, see the pending Petition for Certiorari filed by Waters and Samuels, No. 74-1064. Citations are to the appendix of that Petition.

The Seventh Circuit affirmed the finding as it affected Mr. Waters. (App. 17a). Petitioner simply overlooks these findings and the uncontested facts that underlie them.

QUESTION 3:

May a union be found jointly liable with an employer for a violation of 42 U. S. C. § 1981 because the union was a party to a provision of a collective bargaining agreement which was racially neutral on its face, but was found illegal because the employer had previously engaged in racial discrimination in hire, where the union did not participate in the hiring?

ANSWER:

After the trial of this cause, the district judge found that respondent Local 21 was a party to a collective bargaining agreement and to a 1966 amendment to that agreement, both of which perpetrated the effects of past discriminatory practices. The trial court then awarded plaintiffs back pay and attorneys' fees "from the defendants Wisconsin Steel and Local 21." (App. 28a). Defendant Local 21 filed a motion under Rule 59, F. R. Civ. P., to amend the judgment. However, the Union's motion challenged only the finding that it was liable at all, and not the trial court's apportionment of damages.

On cross-appeals to the Seventh Circuit, petitioner Local 21 again failed to challenge the district court's appointment of liability and damages. The Seventh Circuit found that the Union was liable. The Seventh Circuit affirmed[2] the finding that the 1966 amendment to the collective bargaining agreement which restored seniority rights to white bricklayers who had accepted severance pay and thereby placed them ahead of respondent

2. The Seventh Circuit found that "last hired, first fired" seniority provision contained in the collective bargaining was immune from challenge under Title VII and therefore also immune under § 1981, and thus reversed that portion of the district court's judgment. The correctness of that decision has been challenged by respondents Waters and Samuels in their pending Petition for Certiorari, No. 74-1064.

Waters for purposes of recall was discriminatory. Also, the Seventh Circuit affirmed the conclusion of the trial court that "the union was an integral party to the June 1966 amendment which discriminated against Waters." The court thus adopted the trial judge's conclusion that "Local 21 * * * shares jointly in the liability of Wisconsin Steel." (App. 17a-18a).

The apportionment of liability was within the discretion of the trial judge. See *Barnett* v. *Grant*, ... F. 2d ....., 9 EPD § 10,199 (4th Cir. 1975); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F. 2d 1364 (5th Cir. 1974). Having never suggested to the trial judge that the apportioned damages in any manner other than jointly, and having failed to appeal the joint apportionment of damages by the district court, respondent is now foreclosed from asking this Court to apportion damages in a different manner.

QUESTION 4:

If 42 U. S. C. § 1981 forbids racial discrimination in private employment, is the appropriate statute of limitations in a suit for back pay the residual statute of limitations of the State in which the alleged violation occurred?

ANSWER:

According to the teachings of this Court in *Johnson, supra*, 95 S. Ct. at 1721, the controlling statute of limitations for actions brought under § 1981 is "the most appropriate one provided by state law." After careful analysis of the available limitation provisions under Illinois law, the Seventh Circuit found the most appropriate statute to be Ill. Rev. Stat. Ch. 83 § 16 (1967) governing civil actions not otherwise provided for. *Waters* v. *Wisconsin Steel Wks. of International Harvester Co.*, 427 F. 2d 476, 488 (1970).

Petitioner nowhere suggests that the statute of limitations adopted by the Seventh Circuit is not the most appropriate one provided by Illinois law. Nor does petitioner suggest that the

five-year limitations period is "inconsistent with the federal policy underlying" § 1981. See, *Johnson* v. *Railway Express Agency, supra,* 95 S. Ct. at 1722. Petitioner merely observes that different circuits have adopted different state limitations statutes. That result, however, is not surprising inasmuch as the statutory schemes of each of the 50 states differs substantially. Absent a showing that the statute adopted below is not the most appropriate statute or that it is inconsistent with the federal policy underlying § 1981, there is no basis for review by this court.

CONCLUSION.

Each of the questions posed by petitioner either have been answered by the Court or do not arise on this record. For these reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1350

UNITED ORDER OF AMERICAN BRICKLAYERS AND STONE MASONS, LOCAL 21, *Petitioner*

v.

WILLIAM A. WATERS AND DONALD SAMUELS, AND WISCONSIN STEEL WORKS OF INTERNATIONAL HARVESTER COMPANY, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY MEMORANDUM

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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PETITIONER'S REPLY MEMORANDUM

In the union's opposition to the plaintiffs' petition for certiorari in No. 74-1064 (Pl. Pet.) we demonstrated that none of the Questions Presented by the plaintiffs' petition arises on this record (Un. Opp. 5-9). Perhaps on the theory that turnabout is fair play, plaintiffs argue that the second and third questions raised by the union's petition do not arise. (Pl. Opp. 2-3). Since we do not seek to prolong this litigation if the plaintiffs' petition for certiorari is denied (Un.

Pet. 14-15), a standoff would be entirely satisfactory to us. Nevertheless, although it should be academic, we shall show that the union's second and third questions are indeed properly here.

A. The critical element of our Question 2 is that the black worker who was granted recall preference by the Court (here, plaintiff Waters) "had not been discriminated against in hire". Neither the "finding" which plaintiffs emphasize (Pl. Opp. 2-3), nor anything else in the Court of Appeals' opinion states or even hints that Waters *had* been discriminated against in hire. While plaintiffs did so assert in their Petition for Certiorari in No. 74-1064, the briefs in opposition therein refuted this claim so thoroughly that plaintiffs did not have the temerity to renew it in their reply in that case.[1] Nor, despite their general denial that the issue raised in Question 2 arises on this record, do plaintiffs in their opposition assert that Waters had

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[1] The closest that plaintiffs came to meeting this issue in that reply was a desperately contrived charge of inconsistency:

> "In opposing Waters' Petition for Writ of Certiorari in this case, No. 74-1064, the union asserts the Seventh Circuit did not hold that respondents had discriminated against Waters. * * * In seeking Certiorari regarding other aspects of this case, the union takes the opposite position and asserts the Court of Appeals *did* conclude that plaintiff Waters was discriminated against." (Pl. Rep. No. 74-1064, p. 4, emphasis in original.)

This incomplete and therefore grossly misleading statement of our position conceals the fact that our submissions accurately describe the Seventh Circuit's holdings with respect to *two different* forms of discrimination: In opposing certiorari in No. 74-1064, we asserted (pp. 2-4, 6, 8, n. 11) that the Seventh Circuit did not hold that respondents had discriminated against Waters *in hire;* in our Petition in No. 74-1350 we assert (pp. 2, 9-11, 18-20) that the Court of Appeals *did* conclude that plaintiff Waters was discriminated against *in recall.*

been discriminated against in hire, and of course they present no record support for such an allegation. The conclusion is inescapable that Question 2 *is* squarely presented on this record.

The Court of Appeals' finding on which plaintiffs rely, that the amendment to the earlier severance pay agreement "plac[ed] those white bricklayers ahead of black bricklayers" was not "overlook[ed]" by our petition; on the contrary, the very issue raised is whether that finding is sufficient as a matter of law to establish a violation in refusing to recall a black bricklayer who was not himself the victim of discrimination in hire.

Our interpretation of 42 U.S.C. § 1981 has now received the support of the Fifth Circuit in *Watkins* v. *United Steelworkers, etc.*, 10 FEP Cases 1297 (July 16, 1975), *reversing* 369 F.Supp. 1221 (E.D.La.) on which plaintiffs had relied in *their* Petition, pp. 14, 17, 19, n. 22. The Fifth Circuit ruled in *Watkins* that black workers who have not themselves been discriminated against in hire are not entitled to preference over white employees either with respect to protection from layoff or with respect to recall, even where the employer had discriminated against blacks in hiring before 1965, when the 1964 Civil Rights Act became effective. In so ruling, the Court of Appeals approved and followed the decision of the Seventh Circuit in this case insofar as it rejected the claims of Waters and Samuels (which are the subject of No. 74-1064) and of the Sixth Circuit in *Long* v. *Ford Motor Co.*, 496 F.2d 500, on which we rely, see Pet. 19-20 herein. 10 FEP Cases at 1304. The *Watkins* Court also declared that the Seventh Circuit's decision in Waters' favor (which is the subject of the union's petition) is "different factually" from

Watkins.[2] So, indeed it is. The decision that Waters' rights under § 1981 had been violated cannot be reconciled in principle with the holdings of *Watkins* and *Long*.

B. We fully agree with plaintiffs that a party may not raise in a Petition for Certiorari an issue which it did not present to the courts below. However, as plaintiffs' own description of the proceedings below demonstrates (Pl. Opp. 3-4), the union did at all times raise and preserve its position reasserted in Question 3 here, that it may not be found jointly liable with the employer, because if Waters' rights under 42 U.S.C. § 1981 were violated, the fault was exclusively that of the company (see Un. Pet. 20-22).

The Fourth Circuit in *Barnett* v. *W. T. Grant*, F.2d , 10 FEP Cases 1057, cited at Pet. Opp. 4, has now joined the Fifth Circuit (see Un. Pet. 20-21) in holding that the union's monetary liability does not flow automatically from the fact that it was signatory to a contractual provision which was held to result in a violation of § 1981. In *Barnett* the defendants' sole monetary liability was for costs and reasonable counsel fees, see *id.* at 1062-1063. The Court said:

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[2] The Court said:

> "As to the argument of plaintiffs that seniority as a basis of recall violates Title VII where it 'locks in' past discrimination, the Waters case is different factually from the case *sub judice* by the presence of the *discriminatory* amendment to the collective bargaining agreement." (*Id.*, emphasis supplied.)

In order to decide the case before it the Fifth Circuit had no need to examine critically the Seventh Circuit's characterization of the challenged amendment to the recall agreement as "discriminatory". But while that agreement created a preference for one group over another and in that sense discriminated between them, the preference was not based on race and therefore not "discriminatory" in an invidious or statutorily prescribed sense.

> "These may be taxed against defendant W. T. Grant Company *and/or* against International Brotherhood of Teamsters and Teamsters Local 71, and may be allocated among the defendants in such proportions as to the district court may seem just and proper." (*Id.* at 1063, emphasis added.)

The Fourth Circuit thus required the District Court to determine the proportions that each defendant was to pay, specifically leaving open (by use of "or") the possibility that the "proportion" allocable to a particular defendant would be zero. *That* is our contention with respect to the union here.[3] Similarly, in *Guerra* v. *Manchester Corp.*, 498 F.2d 641, 645, n. 3, 655-656, the Fifth Circuit approved a district court's order which imposed the full burden of payment on the union because it had been "the primary source of the stimulus that provoked [the plaintiff's] illegal transfer" under a union operated hiring hall. See *id.* at 656.

II

A. The decision of this Court in *Johnson* v. *Railway Express Agency, Inc.*, 95 S.Ct. 1716, that 42 U.S.C.

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[3] Plaintiffs' dismissal of the problem by saying that an "apportionment of liability was within the discretion of the trial judge" (Pl. Opp. 4) overlooks *Albemarle Paper Co.* v. *Moody*, 95 S.Ct. 2362, where this Court rejected the petitioners' contention "that the statutory scheme provides no guidance, beyond indicating that back pay awards are within the District Court's discretion." (Id. at 2370.) So here the question whether back pay should be awarded against a *particular* defendant is, as the Fourth and Fifth Circuits have recognized, a "discretionary choice [which] is not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles'." (*id.* at 2362, quoting *United States* v. *Burr*, 25 Fed. Cas. No. 14, 692d, pp. 30, 35 (Marshall, C.J.). The "sound legal principles" governing the basis of liability between defendants should be established by this Court.

§ 1981 prohibits "racial discrimination in the making and enforcement of contracts" of employment (*id.* at 1720) answers the first part of Question 1 presented by our Petition. But this leaves open, and indeed brings to the forefront of litigation under § 1981, the second part of that question: "If so, does it prohibit discriminatory practices other than the refusal to hire on the basis of race?" That question has not even been considered by the courts of appeals whose views of § 1981 were approved in *Johnson,* and cannot be decided in favor of coverage on the basis of the "make and enforce" language of § 1981 or the generative analogy of *Jones* v. *Mayer,* 392 U.S. 409. See Un. Pet. 17, which plaintiffs studiously ignore.[4]

B. The holding of the Court in *Johnson* that "the controlling statute of limitations of actions brought under § 1981 is 'the most appropriate one provided by state law'" (Pl. Opp. 4, quoting 95 S.Ct. at 1721) leaves unresolved the issue presented by our Question 4, which is how the courts are to ascertain *which* statute *is* "the most appropriate one". That is, of course, a federal question (42 U.S.C. § 1988, quoted in *Johnson,*

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[4] We note also that even the portion of *Johnson* on which plaintiffs rely (Pl. Opp. 2) "lacks the precedential weight of a case involving a truly adversary controversy" (*Bob Jones University* v. *Simon,* 416 U.S. 725, 740, n. 11) because none of the parties in *Johnson* questioned the applicability of § 1981 to employment contracts. Given the unanimity of the Court of Appeals' decisions the respondents in *Johnson* understandably opted to embrace their holding that § 1981 is applicable but provides an entirely separate statutory remedy from Title VII, so that the invocation of the latter does not toll the limitations period under § 1981. See particularly Brief for Respondents Brotherhood, etc., No. 73-1543, pp. 15-16; Brief for Respondent REA Express, Inc., *id.*, p. 9; Reply Brief for REA Express, Inc., *id.* pp. 3-6. While that approach was vindicated by the outcome (see particularly parts III and IVC of the *Johnson* opinion) it deprived this Court of the benefits of the full presentation which such an issue merits. See Un. Pet. 15-16.

95 S.Ct. at 1722, n. 10), but it is one as to which the decisions in the circuits are in total disarray, see Un. Pet. 23-25. While absolute identity in result is, as we acknowledged (Pet. 25, n. 16), beyond reach since the number of years of the limitations period will necessarily differ from state to state, uniformity in method —*i.e.*, in identifying the "appropriate" state statute— is obviously desirable and readily attainable. For example, a holding that the courts should borrow an available state limitations statute governing civil rights claims (as the Sixth Circuit has held and as we unsuccessfully urged below) would be dispositive in the majority of states which allow claims for civil rights violations.[5]

CONCLUSION

For the foregoing reasons and those stated in our petition in No. 74-1350 petition for certiorari should be granted if certiorari is granted in No. 74-1064.

Respectfully submitted,

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[5] So too, a holding that the residual (or "catch-all") statute should be utilized (as the Seventh Circuit held here) would resolve all cases, while a holding that it is not "appropriate" would at the least make clear to the lower courts that they must identify the specific analogous state statute.